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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 287

EARL RUSSELL BROWDER, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT**

PETITION FOR CERTIORARI FILED JULY 25, 1940.

CERTIORARI GRANTED OCTOBER 31, 1940.

2
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INDEX.

	PAGES
Statement Under Rule 13	1
Indictment	2
Case and Exceptions	6
Motion Relating to Indictment	7
Motions to Dismiss Indictment	15
Opening for the Prosecution	37
Opening for the Defense	45
Motions to Strike Out Certain Exhibits	223
Motions to Strike Out Certain Testimony	225
Motions to Dismiss Indictment and Acquit the De- fendant	226, 232
Motions to Strike Out Certain Testimony and Exhibits	230
Summation by Defendant	236
Summation by Prosecution	263
Defendant's Requests to Charge	278
Charge of the Court	291
Additional Requests With Reference to Charges	296
Verdict	301
Stipulation as to Exhibits	377
Judgment	378
Notice of Appeal	379
Grounds of Appeal	380
Assignments of Error	382
Stipulation as to Record	397
Clerk's Certificate	398
Proceedings in U. S. C. C. A., Second Circuit	399
Opinion, Patterson, J.	399
Judgment	403
Clerk's certificate	404
Order allowing certiorari	405

TESTIMONY.

Government's Witnesses:

	PAGES
Charles Siegel,	
Direct	54
Cross	59
Recalled, cross	61
Re-direct	67
Re-cross	68
James Joseph Hughes,	
Direct	70
Cross	77
Re-direct	80
Re-cross	82
Elma V. Waldron,	
Direct	82
Cross	87
Re-direct	91
Recalled, direct	161
Recalled, cross	166
Mary Josephine Hayes,	
Direct	92
John O. Bell,	
Direct	95
Cross	108
Recalled, direct	146, 167, 196
Recalled, cross	149, 170, 221
Recalled, re-direct	172
Recalled, re-cross	173
Loftus Murray,	
Direct	112
Cross	115
Jacob Levy,	
Direct	116

	PAGE
Knute B. Larson,	
Direct	118
Cross	121
Louis Schneittacher,	
Direct	123
George E. German,	
Direct	124
Cross	128
Lawrence Stevenson,	
Direct	129
Cross	130
Kinard D. Abbott,	
Direct	131
Nicholas Dozenberg,	
Direct	132
Cross	141
Re-direct	142
Ira Ford Hoyt,	
Direct	142
George E. Powers,	
Direct	150
Cross	173
Re-direct	179
Max Bedacht,	
Direct	183
Matthew C. Earl,	
Direct	190
Cross	195
Walter G. Blackburn,	
Direct	201
Cross	219

EXHIBITS.

Government's Exhibits:

	Admitted Page	Printed Page
1 for identification—Same as Exhibit 16	54	304
1a for identification—Same as Exhibit 16a	54	304
2—Browder's application for passport, August 31, 1934	56	305
3—Albert Henry Richard's application for renewal of passport	190	307
3a—Richard's application for passport, November 18, 1931	190	309
4—Nicholas Dozenberg's application for passport, March 9, 1921	56, 134	311
5—Browder's passport, September 1, 1934	58	313
6—Browder's application for renewal of passport, February 2, 1937	57	331
7—Letter of Daily Worker to R. B. Shipley, Chief, Passport Division, requesting validation of Browder's passport to Spain, together with notation that passport was so validated	57	333
8—Extract from mailing record showing mailing of Browder's passport	103	334
9—Manifest of the S. S. Berengaria (not printed)	114	334
10—Manifest of the S. S. Aquitania (not printed)	115	334
11—Baggage declaration of Browder	117	335
12—Baggage declaration of Browder	117	336
13—Petition for naturalization of Dozenberg (not printed)	137	337

	Admitted Page	Printed Page
14—Duplicate certificate of naturalization of Dozenberg	137	339
15—List of passports sent by the Department of State, Washington, D. C., to N. Y. Passport Agency, March 13, 1921. In- cluded in this list is passport 2990 in name of Dozenberg	144	341
16—George Morris's application for passport, November 17, 1927	153	343
16a—Affidavit accompanying passport appli- cation of Morris	165	345
17—Stipulation re Browder's citizenship	165	347
18—Stipulation re Browder's handwriting on Exhibit 2	165	348
19—Mailing list of the Passport Division of Department of State, Washington, D. C., November 21, 1927, indicating mail- ing of Morris' passport (not printed) ..	170	351
20—Extract from mailing record showing mailing of Richard's passport	197	351
21—Passport Regulations—Rules Governing the Granting and Issuing of Passports in the United States revised to March 31, 1938 (not printed)	200	351
22—Passport Regulations, Executive Order, January 31, 1928—Rules Governing the Granting and Issuing of Passports in the United States (not printed)	200	351
23—Passport Regulations—Rules Governing the Granting and Issuing of Passports in the United States, Executive Order 5860, June 22, 1932; Departmental Order 538, June 22, 1932	200	352

	Admitted Page	Printed Page
24—Executive Order 6650, March 23, 1934, Amending Executive Order 5860 (not printed)	200	374
25—Identical with Exhibit 23	200	374
26—Photographic enlargement of first page of Government's Exhibit 2 (not printed)...	206	374
27—Photographic enlargement of reverse side of Government's Exhibit 2 (not printed)	206	375
28—Photographic enlargement of first page of Government's Exhibit 14 (not printed)	206	375
29—Photographic enlargement of reverse side of Government's Exhibit 14 (not printed)	206	375
30—Photographic enlargement of first page of Government's Exhibit 11 (not printed)	206	375
31—Photographic enlargement of first page of Government's Exhibit 12 (not printed)	206	375
32—Photographic enlargement of the word "None" on Government's Exhibits 3, 3a, 4 and 16 (not printed)	206	375
33—Photographic enlargement of reverse side of Government's Exhibit 3 (not printed)	206	376
34—Photographic enlargement of first page of Government's Exhibit 3 (not printed)	206	376
35—Photographic enlargement of first page of Government's Exhibit 16 (not printed)	206	376
36—Photographic enlargement of first page of Government's Exhibit 4 (not printed)	206	376
37—Photographic enlargement of reverse side of Government's Exhibit 4 (not printed)	206	376

- | | | |
|--|-----|-----|
| 38—Photographic enlargement of reverse side
of Government's Exhibit 3a (not printed) | 206 | 376 |
| 39—Photographic enlargement of reverse side
of Government's Exhibit 16 (not printed) | 206 | 376 |
| 40—Photographic enlargement of first page of
Government's Exhibit 3a (not printed) | 206 | 377 |
| 41—Photographic enlargement of 2 signatures
of Nicholas Dozenberg appearing on
Government's Exhibit 13 (not printed) | 206 | 377 |

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1

United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against

EARL RUSSELL BROWDER,

Defendant-Appellant.

2

Statement Under Rule 13.

3

The indictment in this case (C 106-210) was filed on November 17, 1939. The indictment is in two counts. Each count charges a violation of Section 220 of Title 22 of the United States Code. On November 20, 1939, the defendant pleaded not guilty. Bail in the sum of \$7,500 was set and was furnished on this date. The case came on for trial before Hon. ALFRED C. COXE, United States District Judge, and a jury in the Southern District of New York on January 17, 1940. The trial continued up to, and concluded on, January 22, 1940, when a verdict of guilty on each count of the indictment was returned. The defendant was sentenced on that date to a prison term of two years on each count of the indictment and a fine of \$1,000 on each count of the indictment; the prison terms to run consecutively; the total fine to be \$2,000. Judgment was entered on the date of sentence. On January 23, 1940, notice of appeal was filed. On February 7, 1940, the assignment of errors was filed. The defendant has been released on bail pending the outcome of this appeal.

Indictment.

IN THE DISTRICT COURT OF THE
UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

Southern District of New York, ss.: The Grand Jurors for the United States of America, duly empaneled and sworn in the District Court of the United States for the Southern District of New York and inquiring for that District, upon their oath present:

That heretofore, to wit, on or about the 30th day of April, 1937, at the Southern District of New York and within the jurisdiction of this Court, EARL RUSSELL BROWDER, alias "Nicholas Dozenberg", alias "George Morris", alias "Albert Henry Richards", the defendant herein, unlawfully, wilfully and knowingly, for the purpose of entering the United States, used and attempted to use a passport, issued under the authority of the United States, the issue of which he secured by reason of a false statement which he made in the application therefor; that is to say, at the time and place aforesaid, the defendant herein did unlawfully, wilfully and knowingly use and attempt to use passport number 145132, issued on or about September 1, 1934, in the name of Earl Russell Browder, which said passport the defendant herein had obtained and secured by reason of a false statement made in the application therefor, which said application was executed by him at a passport agency of the Department of State at New York City, New York, on or about August 31, 1934, in the name of Earl Russell Browder, which said passport thereafter was renewed at a passport agency of the Department of State at New York City, New York, on or about February 2, 1937, in which said passport application, executed on or about August 31, 1934, as aforesaid, the defendant

Indictment.

7

rein stated that the statements in said application, including the statement "None" in a blank after the words "My last passport was obtained from", were true, whereas, in truth and in fact, as the defendant herein then and there well knew, he had previously obtained passport number 2990, in the name of "Nicholas Dozenberg", which said passport was issued on or about March 12, 1921, on an application executed at a passport agency of the Department of State at New York City, New York, on or about March 9, 1921, and had also previously obtained passport number 475085, in the name of "George Morris", which said passport was issued on or about November 19, 1927, on an application executed at a passport agency of the Department of State at New York City, New York, on or about November 17, 1927, and had also previously obtained passport number 451,933 in the name of "Albert Henry Richards", which said passport was issued on or about November 19, 1931, on an application executed at a passport agency of the Department of State at New York City, New York, on or about November 18, 1931, which said passport thereafter was renewed at a passport agency of the Department of State at Chicago, Illinois, on or about November 9, 1933, which said passport number 145182, issued on or about September 1, 1934, in the name of Earl Russell Browder, issued on the said application as aforesaid, the defendant herein did use, and present to an Inspector of the United States Immigration and Naturalization Service, at the Port and City of New York, within the Southern District of New York and within the jurisdiction of this Court on or about the 30th day of April, 1937, to obtain and secure entry and admission into the United States; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 22; Section 220, United States Code).

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9

10

Indictment.

SECOND COUNT.

11

12

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that heretofore, to wit, on or about the 16th day of February, 1938, at the Southern District of New York and within the jurisdiction of this Court, EARL RUSSELL BROWDER, alias "Nicholas Dozenberg", alias "George Morris", alias "Albert Henry Richards", the defendant herein, unlawfully, wilfully and knowingly, for the purpose of entering the United States, used and attempted to use a passport, issued under the authority of the United States, the issue of which he secured by reason of a false statement which he made in the application therefor; that is to say, at the time and place aforesaid, the defendant herein did unlawfully, wilfully and knowingly use and attempt to use passport number 145182, issued on or about September 1, 1934, in the name of Earl Russell Browder, which said passport the defendant herein had obtained and secured by reason of a false statement made in the application therefor, which said application was executed by him at a passport agency of the Department of State at New York City, New York, on or about August 31, 1934, in the name of Earl Russell Browder, which said passport thereafter was renewed at a passport agency of the Department of State at New York City, New York, on or about February 2, 1937, in which said passport application, executed on or about August 31, 1934, as aforesaid, the defendant herein stated that the statements in said application, including the statement "None" in a blank after the words "My last passport was obtained from", were true, whereas, in truth and in fact, as the defendant herein then and there well knew, he had previously obtained passport number 2990, in the name of "Nicholas Dozenberg", which said passport was issued on or about March 12, 1921, on an application executed at a passport agency of the Department of State at New

Indictment.

13

ork City, New York, on or about March 9, 1921, and had
so previously obtained passport number 475085, in the
ame of "George Morris", which said passport was issued
n or about November 19, 1927, on an application executed
t a passport agency of the Department of State at New
ork City, New York, on or about November 17, 1927, and
ad also previously obtained passport number 451933, in
he name of "Albert Henry Richards", which said pass-
ort was issued on or about November 19, 1931, on an
pplication executed at a passport agency of the Depart-
ent of State at New York City, New York, on or about
ovember 18, 1931, which said passport thereafter was
enewed at a passport agency of the Department of State
t Chicago, Illinois, on or about November 9, 1933, which
aid passport number 145182, issued on or about Septem-
er 1, 1934, in the name of Earl Russel Browder, issued on
he said application as aforesaid, the defendant herein did
se, and present to an Inspector of the United States
mmigration and Naturalization Service, at the Port and
ity of New York, within the Southern District of New
ork and within the jurisdiction of this Court on or about
he 15th day of February, 1938, to gain and secure entry
nd admission into the United States; against the peace
f the United States and their dignity and contrary to
he form of the statute of the United States in such case
ade and provided (Title 22, Section 220, United States
ode).

14

15

JOHN T. CAHILL,
United States Attorney.

16

Case and Exceptions.**UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.**

C. 106-127

17

UNITED STATES OF AMERICA**VS.****EARL RUSSELL BROWDER, alias "Nicholas Dozenberg," alias
"George Morris," alias "Albert Henry Richards."**

Before—Hon. ALFRED C. COXE, D. J., and a Jury.

New York, January 17, 1940, 10:30 A. M.

18

APPEARANCES:**JOHN T. CAHILL, Esq., United States Attorney, for the
Government; by John T. Cahill, Esq., Lester C. Duni-
gan, Esq., Robert L. Werner, Esq., and Ashley J.
Nicholas, Esq.****BATTLE, LEVY, FOWLER & NEAMAN, Esqs., attorneys for de-
fendant; by George Gordon Battle, Esq., Edward I.
Aranow, Esq., and Edward Kuntz, Esq.****Mr. Cahill: The Government is ready.****Mr. Battle: The defendant is ready, your Honor.****The Court: Are you ready to impanel the jury?**

7
Motion Relating to Indictment.

19

Mr. Battle: If your Honor please, I have a motion I would like to present to the Court before the impaneling of the jury.

If your Honor please, this indictment charges that the defendant on the 30th day of April, 1937, used a passport theretofore issued to him in his own name, in the name of Earl Russell Browder, which passport had been issued on the 1st day of September, 1934, and had thereafter been renewed after two years. The indictment charges that the defendant used that passport on the 30th day of April, 1937, for the purpose of obtaining entrance into the United States by presenting the same to an immigration inspector at the port of New York. It charges that that passport was obtained upon an application made by the defendant which contained a false statement, and the charge therefore is that he used this passport on the 30th of April, 1937, for the purpose of obtaining entry into this country, having theretofore obtained it by a false statement "by reason of which," under the language of the statute, "the passport was issued."

20

Now the indictment sets forth—

The Court: May I have the original indictment. (Indictment handed to the Court.)

21

Mr. Battle: Your Honor, you will see the indictment says that on or about the 30th day of April, 1937, at the Southern District of New York and within the jurisdiction of this Court, that the defendant for the purpose of entering the United States, used and attempted to use a passport the issue of which was secured by reason of false statements which he made in the application.

The indictment then goes on to say that in this passport application the defendant stated that the statements in said application, including the statement "None" in a blank after the words "My last passport was obtained from," were true.

22

Motion Relating to Indictment.

I show you that application which I think would make that rather clearer.

Now your Honor will see that item or that entry there on that application reads as follows: "My last passport was obtained from —" and then underneath that blank are written the words "State, Washington or the foreign locality where the passport was issued." And then a blank and underneath that blank is written the word "Date" and "Is herewith submitted for cancellation." That is the end of the sentence. Then there is a blank there for another sentence with a notation under it, "If the passport is not available or not produced, state what disposition has been made of it;" or words to that effect.

Your Honor will see, therefore, that this whole statement relates necessarily to the last passport. Our contention is, and we will elaborate that in a later motion, but our contention is that there is no statement there upon which an allegation or an averment of falsity can be predicated. According to the indictment there are two ways of ascertaining what the statement is that the prosecution claims is a false statement. One would be just the mere word "None." The indictment specifically says that the statement is the word "None," in that blank. And the other would be "My last passport was obtained from, None."

24

But in either event, by any reading, it necessarily relates to the last passport, that is, to the latest passport, the passport that next preceded the issuance of this passport in question, which was issued on September 1st, 1934. So that the indictment curiously enough does not charge that that is a false statement. It simply says that the defendant stated that this statement "None" in a blank after the words "My last passport was obtained from," was true; whereas in truth and in fact as the defendant herein then and there well knew, he had previously obtained passport number 2990, in the name of "Nicholas Dozenberg," which said passport was issued on or about March 12, 1921,

Motion Relating to Indictment.

25

on an application executed at a passport agency of the Department of State at New York City, New York, on or about March 9, 1921, and had also previously obtained passport number 475085, in the name of "George Morris," which said passport was issued on or about November 19, 1927, on an application executed at a passport agency of the Department of State at New York City, New York, on or about November 17, 1927, and had also previously obtained passport number 451933, in the name of "Albert Henry Richards," which said passport was issued on or about November 19, 1931, on an application executed at a passport agency of the Department of State at New York City, New York, on or about November 18, 1931, which said passport thereafter was renewed at a passport agency of the Department of State at Chicago, Illinois, on or about November 9, 1933.

26

So that after setting forth a statement which is claimed to be the false statement, the indictment goes on to recite three previous passports which the indictment states were issued to the defendant Browder prior to this application made by him on August 31, 1934.

Now, by the allegation of the indictment of the passport issued in the name of Richards, which was issued on or about November 19, 1931, and thereafter renewed—that was the last passport prior to the passport of August 1934—and this statement which the indictment charges as being a false statement relates solely to the last passport. So that it seems clear, your Honor, that all that the Government need prove or can prove, in order to negative that statement—whatever it may mean—because whatever it means, it relates solely to the last passport—all that the Government need prove is to show that there was a previous passport issued to the defendant and, to show when that last previous passport was issued.

27

The indictment charges that the last previous passport was the Richards passport issued in 1931. So it is our

28

Motion Relating to Indictment.

29

contention that the allegations in the indictment as to the two prior passports—the passport in the name of Morris and the passport in the name of Dozenberg—are surplusage, because the statement relates only to the last passport; and according to the language of the indictment, and we are prepared to admit that that is correct, the last passport prior to the Browder passport was the Richards passport issued in 1931. So that it seems clear to us that the two allegations as to the two passports prior to the Richards passport, that is, the Morris and the Dozenberg passports, are surplusage and they are necessarily very prejudicial surplusage to the defendant, because they allege that he obtained two passports under two other names. And while there are explanations of all of these things, it is evidently prejudicial.

30

Under the practice as to dealing with surplusage in indictments, the Court has held in the Beck case, and that has been affirmed,—the Court has held in this case as to the proper procedure that where there are surplusage averments in an indictment, that the proper procedure is to make a motion calling the attention of the Court to it in advance, so that the Court may determine just what is to be done about it before the trial:

In the case of *Ford v. United States*, there the indictment charged a conspiracy to violate the National Prohibition Act and also to violate a treaty between the United States and Great Britain. Objection was made to the indictment on the ground that violation of the treaty was admittedly not a crime and therefore a conspiracy to violate the treaty was not indictable. And the Court held:

“The validity of the indictment is attacked, first, because it charges that the conspiracy was to violate the treaty, although the treaty creates no offense against the law of the United States. This is true, but that part of the indictment is merely surplusage

Motion Relating to Indictment.

31

and may be rejected." Citing *Bailey v. U. S.*, *Remus v. U. S.*; *United States v. Weiss*, and the *United States v. Drawdy*.

"The Trial Court took this view. But it is contended that this is to amend the indictment and comes within the inhibition of the principle of *Ex Parte Bain*, 121 U. S. 1. That it is not condemns the striking out of words from an indictment. The action here complained of is merely a judicial holding that a useless averment is innocuous and may be ignored."

32

So that the Supreme Court holds that surplusage averments in an indictment may be ignored and should be ignored, and that is held in a number of different cases, in the case of *Sondericker v. United States*, 41 F.(2d) 144; in *Beck v. United States*, 33 F. (2d) 107. In that case the defendants were indicted for using the mails to promote a fraudulent building financing scheme. The Court held in that case, to use the language of the Court, that there were "a cloud of other allegations that were either insufficient or unsupported by the evidence." Now the Court said:

33

"There is, however, another principle of law which holds that surplusage in an indictment may be disregarded (citing *Matthews v. U. S.*). That case, is true, dealt with surplusage incident to the main charge and did not mislead."

Now the Court says in the *Beck* case that:

"The surplusage in the present indictment"—and that is just what we claim in the situation here—"The surplusage in the present indictment is collateral to the charges already pleaded and may have misled. This situation can be remedied by the Court upon proper

34

Motion Relating to Indictment.

motion sufficiently in advance of the trial, determining what misrepresentations the defendant will be required to meet on the trial."

35

And it is on that authority that we are making this motion now, to ask that your Honor rule that these averments in the indictment in respect to Dozenberg and in respect to Morris are surplusage because the false statement relates only to the last passport, and admittedly under the language of the indictment itself the last passport was the Richards passport and the Dozenberg and Morris passports preceded the Richards passport and therefore can't be said in any sense to be the last passport.

The Court: Is it now true that Mr. Browder could have answered the question in the application blank by giving correct information with respect to the Richards passport and stop there, but then on the contrary he went farther and said "None", indicating that he had not previously obtained any passport, including the Richards passport? In other words, hasn't he himself volunteered the information which perhaps strictly speaking was not required by the application blank?

36

Mr. Battle: Your Honor, it is impossible to eliminate from that sentence the idea of its relating to the last passport.

The Court: But if you concede for the sake of the argument that he could have merely given the information with respect to the Richards passport, and thus would have complied with all of the requirements of the Department. He didn't do that, but he went a step further and he said that he had obtained no passport, or he used the word "None", indicating that he himself was volunteering the information to the Department as an inducement to issuing the passport, that he had not received any passports at all.

Motion Relating to Indictment.

37

Mr. Battle: I see exactly what your Honor has in mind.

The Court: What I am getting at, is this case restricted entirely to the information which might have been given by him by answering the questions required by the application, or should the Court not properly consider also any information which he may have volunteered which was used by the Department in issuing the passport? I am just posing the question.

Mr. Battle: I appreciate what your Honor has in mind. My answer to that is that the statement as set forth in the indictment and as appears on the application, does necessarily relate solely to the last passport. The sentence is—the language of the application says, “My last passport was obtained from” blank “On” blank, “and is submitted herewith for cancellation.”

38

As a matter of fact, I think it is apparent—

The Court: “None” is no answer to the question as it stands in any event.

Mr. Battle: I don’t think it is any answer at all. I don’t think it is any statement. I don’t think it is any statement upon which a charge of falsity can be predicated. Whatever it is, whatever the Government may claim it means, I submit that it includes and must necessarily include, the idea of the last passport. It can’t relate to anything else.

39

The Court: In the ordinary use of language I should think that the word “None” in that particular connotation, is susceptible to meaning that he had not theretofore procured a passport on an application.

Mr. Battle: The words are inserted under the blank after the words “My last passport was obtained from” the words “Insert Washington or location of office abroad.” I don’t think it can be construed to relate to any passport.

The Court: I see your point. Is there any comment?

Mr. Cahill: I shall be very brief, your Honor. I think certainly the word “None,” as put in the application, by

40

Motion Relating to Indictment.

41

Browder, is susceptible of the meaning "Not any." The statute on which the indictment is based here contains requirements that we show that the false statement was knowingly and wilfully put forward and with the intent to secure the issuance of the passport. The word "None" has significance, it seems to me, on the elements of the guilty mind and the specific intent. And further than that, since the proof on behalf of the Government will show that the same scheme was resorted to in respect of each of the prior passports, namely, the use of the word "None," that it has bearing on the issue of wilfulness.

42

And if your Honor please, at this time I think that there can be no argument that it is surplusage. I think the very expression selected by the defendant was calculated to achieve the result which the word itself patently requires—"Not any."

Mr. Battle: Now, if your Honor please, your Honor will see that the question is not really a question but the statement there on the application reads "My last passport was obtained from" blank "on" blank, "and is herewith submitted for cancellation." What I am addressing myself now, to is the allegation in the indictment. On the other question of what evidence may be offered along that line, that would be another proposition. But the allegation in the indictment, the indictment charges that the false statement was the word "None" inserted in that blank just after the words "My last passport was obtained from". So it seems to me that it must necessarily relate to the last passport and cannot be said to mean that there was no passport, never had a passport. The item does not call for any such information. The item only calls for information as to the last passport, and the indictment itself goes on with the last passport in point of time, which is what that means, the latest passport was the passport issued in the name of Richards in 1931.

Motions to Dismiss Indictment.

43

It is on that ground that we claim as far as the indictment is concerned those allegations are surplusage.

Your Honor's ruling on this would not prevent the offering of evidence on that later on in the course of the trial.

The Court: I will deny the motion and give you an exception.

Mr. Battle: Exception.

The Court: Are we ready to impanel the jury?

Mr. Cahill: The Government is ready, your Honor.

Mr. Battle: May I add, if your Honor please, on the ground of the motion that I have just made, that these other allegations relate to and in effect charge other crimes that are now outlawed by the statute. May I add that to the ground on which my previous motion was made? 44

The Court: Yes.

Mr. Battle: Your Honor will give me the benefit of an exception.

The Court: Yes. We might take a recess for about five minutes until the jury comes in.

(After a short recess a jury of twelve and two alternates was duly impaneled and sworn.)

Mr. Battle: I have a memorandum that I prepared with the authorities on this motion, which I will hand up to your Honor, if you would care to see it. 45

If your Honor please, this is a motion to dismiss the indictment and for the acquittal of the defendant on the ground that the use to which the passport was put, as set forth in the indictment, is not a use that is contemplated by the statute. It does not come within the contemplation or prohibition of the statute, and therefore it does not charge, the indictment does not charge, any offense.

Your Honor will recall from your examination of the indictment that the indictment charges, I will read the language of it, that the defendant used and attempted to use a passport for the purpose of entering the United States, and that the defendant on the 30th of April, 1937,

46

Motions to Dismiss Indictment.

used and presented to an inspector of the United States Immigration and Naturalization Service at the port of the City of New York, within the Southern District of New York and within the jurisdiction of this court, on or about the 30th day of April, 1937, to gain and secure entry and admission into the United States * * *.

47

So that the indictment charges a use of this passport within the United States and within this City, and for the purpose of securing entry and admission by the defendant Browder into this country. It is conceded here by stipulation that the defendant Browder was born in this country and is and always has been a citizen of the United States.

Our contention is that the statute, when it denounces the use of the application obtained by false statement, refers solely to and can refer solely to a use of the passport as such, that is, use of it as a passport—a passport use. That is the only use that is indicated in any way by the statute and under the well known rule, the word must be construed according to the context and for the—

The Court: What is the use of a passport?

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Mr. Battle: The formal use of a passport is this: a passport is for the protection of American citizens abroad. It has no function whatever, it has no use within the limits of this country. A passport is not necessary to enter or to leave, for citizens to enter or leave the United States, and whatever was done with this passport in regard to the entry of Mr. Browder into this country on the 30th of April, 1937, was not a passport use.

The Court: What kind of crime would it be if such a passport were used in the bowels of Russia?

Mr. Battle: It would be a crime which could be prosecuted in the courts of this country.

The Court: That may be so, theoretically, but what kind of crime could be prosecuted and proved and sent to a jury with respect to that particular offense which I have mentioned?

Motions to Dismiss Indictment.

49

Mr. Battle: A person could be indicted and tried in this country for a crime committed against the United States in any foreign country. That has been specifically passed on, your Honor. Our contention is—

The Court: Why isn't a passport a credential to be used when a man comes back to this country for the purpose of showing that he is a citizen?

Mr. Battle: Because the law holds that that is not a passport use. A passport can only be used outside of the country.

The Court: Can you point out to me the dicta or law 50 which announces that ruling?

Mr. Battle: Yes, I will do that. I was just speaking preliminarily and I want to go into the matter at such length as your Honor will permit, because I cannot see any answer to it as a legal proposition.

Mr. Cahill: I would like to have the benefit of a copy of this memorandum to save time. We can be looking at it.

Mr. Battle: Certainly, you may have this copy. The offense charged is the use of this passport in the manner that I have indicated and, as I say, our contention is that that is not a use of the document as a passport, and in order to take that up, to go into that, it is first necessary, I think, your Honor, to see just what a passport is. 51

Mr. Gaillard Hunt, who was United States Passport Clerk for years and who is perhaps one of the great experts on the law of passports, in his book on "The American Passport, Its History", says:

"It (the passport) is a document issued by the Secretary of State or under his authority by a diplomatic or consular officer of the United States, stating his citizenship, and requests for him free passage and all lawful aid and protection during his travels or sojourns in foreign lands.

52

Motions to Dismiss Indictment.

"It is intended only for use abroad" and has no sanctioned use, customary or statutory, within the United States in time of peace, and the request which it conveys is expected to receive recognition of the agents of the foreign governments, subject of course to the laws of the foreign governments.

"The most that can be claimed for it is, that it is a request to foreign governments to admit the bearer with the privileges and obligations of a foreign citizen."

53

Professor Moore says in his work on international law:

"A passport is the accepted international evidence of nationality. In its usual form, it certifies that the person described in it is a citizen or subject of the country by whose authority it is issued, and requests for him permission to come and go as well as lawful aid and protection."

And Mr. Taylor in his book, which is an authority, says:

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"As a general rule, a citizen leaving his own country obtains from his government a passport which, so far as other States are concerned, is really no more than a certificate of citizenship with a description of his person, usually substantiated by his autograph. When such a document is presented at the frontier of a friendly foreign state, it is usual for it to grant to the bearer the right of passing through in the form of a visa entered upon the document itself, in order to obviate the inconvenience which would result if an entirely new passport were demanded at the borders of every nationality."

Motions to Dismiss Indictment.

55

Mr. Borchard:

"The passport is the accepted international certificate, or evidence of citizenship, although its evidentiary value is prima facie only * * * It certifies that the person therein described is a citizen of the United States and requests for him while abroad permission to come and go as well as lawful aid and protection."

So that a passport is directed to the authorities, the heads of foreign governments, and it is intended solely for the protection and the use of American citizens while they are abroad, while they are traveling abroad. It is not used within the limits of this country. 56

A very interesting and important pronouncement on that very subject is found in a regulation or a rule issued by President Wilson on this subject of the regulation of passports, which I will read to your Honor in a moment. President Wilson in 1915, in rules and regulations governing the issuance of passports, says:

"Passports issued by the Department of State or its diplomatic or consular representatives are intended for identification and protection in foreign countries and not to facilitate entry into the United States, immigration being under the supervision of the Department of Labor." 57

The authorities all hold that a use must be read and must be construed according to the context and to further the purposes of the statute, just like any other term used in the statute would have to be construed. So that the use that is indicated here in this statute is the use of the document as a passport, a passport document.

In the case of *State v. Stockwell*, 23 North Dakota—in that case the statute authorized the State Superintendent.

58

Motions to Dismiss Indictment.

ent of Public Construction to use certain funds, and he claimed that that statute gave him the ownership of the funds—and the Court said:

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“On the contrary, we find the words ‘use’ and ‘to be used’ must be construed with the context. As an instance, such terms in insurance law mean occupancy; in real estate transfers and the interpretation of wills and devises the word ‘use’ often is interpreted as a trust; while in ordinary language to use is to employ, to derive service from; to ‘use’ moneys is to pay out or disburse them.”

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They held that “use” there did not mean ownership.

In the case in New York, *People v. Ryan*, Appellate Division, where the Court was considering the effect of a statute which made it a crime for a person, without the consent of the owner, to use a milk bottle which had the name of the owner stamped on it, the question arose as to whether the purchaser, the man who purchased the milk bottle, used the bottle, and the Court held that the word “use” must be construed according to the context in order to further the purpose of the statute and therefore it applied only to the seller and not to the purchaser.

There are a number of other cases along that same line which are cited in my brief.

There is a statute making the use of a building for immoral purposes a crime and the Court held that proof of one or sporadic acts did not bring it within the statute, that the “use” implied long, permanent and a persistent use of a building for that purpose, in order to bring it under the statute.

So in this case the word “use” means “use” of a passport as such, and the cases hold that citizens do not need any passport to come into this country; that is, under the

Motions to Dismiss Indictment.

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Constitution, in the slaughterhouse case, the Supreme Court said:

"Under the Constitution citizens have free right of access to come and go, and specifically held that no passport is necessary for a citizen either to enter or to leave the country."

The charge in this case is that Mr. Browder, having this passport issued to him in his own name, presented that passport to an immigration commissioner here in the City of New York, within the limits of the City of New York, and presented it for the purpose of gaining entry into this country. That is not a use that a passport could be possibly used for. The passport gave him no right whatever to enter the country or to leave it. He did not need the passport. The only thing, the only function that the passport served there was to indicate to the immigration inspector his identity and that he was a citizen.

62

The cases hold that a passport—the weight of evidence is—there is some difference of authority—but the weight of the authority is that a passport is not legal evidence of citizenship, but, of course, it is such evidence that an inspector might receive when he was determining whether a man was an alien or a citizen, but that is not a use of the passport as such. It is not the use of it as a passport. A passport might be used within this country by a man who went to the post office to cash a money order, he might produce his passport to show or to prove his identity, just as he might produce a letter addressed to himself or produce a birth certificate; or if a man went to a bank in this country for the purpose of cashing a check or draft, he could produce a passport to identify himself, and that was all he did when he produced this passport before this immigration inspector. He did not come into this country; he was not allowed to come into this country by virtue of

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64

Motions to Dismiss Indictment.

the passport. The passport did not authorize his entry. The passport could not authorize his entry. He had a right to enter without a passport or without any document. The only function that the passport served there was some evidence to the immigration inspector that he was a citizen, and that is not a use of the document as a passport.

It says in the slaughterhouse case, that I just cited,

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"It is said to be the right of a citizen of this great country protected by implied guaranties of its constitution 'to come to the seat of government to assert any claim he may have upon that government, to prosecute any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has a right of free access to its seaports through which all operations of foreign commerce are conducted.' "

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And then, as I say, President Wilson in that regulation which I have just read, says that "passports issued by the Department of State or its diplomatic or consular representatives are intended for identification and protection in foreign countries and not to facilitate entry into the United States, immigration being under the supervision of the Department of Labor."

And Mr. Hunt says, "The passport is intended only for use abroad and has no sanctioned use, customary or statutory, within the United States in time of peace."

Professor Moore says, "There is neither law nor regulation in the United States requiring those who resort to its boundaries, to produce passports. Since the foundation of the government such documents have never been required except in time of war."

I have cited there several opinions of the Attorney General. One or two hold that a passport is not necessary for a citizen to enter.

Motions to Dismiss Indictment.

67

The Court: I should like to hear the other side.

Mr. Cahill: If your Honor please, a good part of the argument assumes the question of use within the United States, and, of course, that is not the case here. The case here has to do with gaining entrance into the United States and gaining entrance in both instances from British boats.

What the argument comes down to, as far as I can grasp it, is that if a man elects to use a given set of credentials to gain entrance into the United States, and it should turn out to be the fact that those credentials have been obtained on the basis of a false statement, that then he can stand up in a court in this country, when he is charged with so doing, and say "Well, that does not make any difference because I could have gotten in legally another way."

68

Let us take the case of a man who gets in on a birth certificate that he has obtained by reason of a false statement, a man who, in fact, was born here, let us say, and when he is brought to the bar of justice for having used a birth certificate falsely obtained, he says, "Well, it isn't anything that was contemplated by statute, because I could have proved in any event by affidavit that I was born in this country." I say to you, sir, that this man elected to use a passport as the method of evidencing his credentials and his right to come in, and that that was a use for which, or to which a passport could be put, and is commonly used by returning travelers from abroad, and it was clearly contemplated within the statute as a use.

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Mr. Battle: Mr. Cahill is mistaken in saying it was not used within the limits of this country. The indictment expressly says that this use was within the Southern District of New York, within the jurisdiction of this court, and the use of the passport was within this country. And there is one fact, your Honor, that shows with the greatest force and conclusively that a passport cannot be used as a means of getting into, a means of securing entrance into this country in times of peace. Up to 1918 the law was

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Motions to Dismiss Indictment.

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just as I have stated it here, a passport cannot be used and is not necessary to be used and cannot be used to secure entry into the country. When the war came on in 1918, a law was passed, Section 224, as a war measure, which made it illegal for citizens to enter or to leave the country without a valid passport, and that law remained in force until 1921, when it was repealed by statute. It was a war measure and at the close of the war it was repealed, and it was said that that provision applied only to aliens, so that the law became in 1921 what it always was up to 1918, to-wit, that a passport could not be used to secure the entry of a citizen into this country.

The use of a passport set forth in this indictment is the presentation of a passport to an immigration inspector, so the immigration inspector could receive it, if he so chose, as evidence or some evidence as to whether the man was an alien or a citizen. If he found him to be a citizen, then the inspector ceased to have any jurisdiction over him—he had no control over him.

72

The Court: Supposing Mr. Browder delivered the passport to an alien, or, to use the language of the statute, furnished it to another for use for entrance into this country, would you say that was not a use contemplated by the statute?

Mr. Battle: I did not quite follow your Honor.

The Court: The statute applies to whoever shall wilfully or knowingly use or attempt to use or furnish to another to use, any passport—

Mr. Battle: The indictment charges—

The Court: I say, you say this is a case of a citizen who can come in without credentials and therefore that it does not apply to him, but suppose that he turned the passport over to someone who was an alien, and the alien used it for the purpose of gaining admission to this country? Would that be a proper use?

Motions to Dismiss Indictment.

73

Mr. Battle: Oh, yes, I think that might be an improper use, your Honor.

The Court: Wouldn't that be a use as covered by the statute?

Mr. Battle: I have not given that consideration, your Honor, because the indictment charges Mr. Browder himself presented it.

The Court: I understand that. I was stating a supposititious case.

Mr. Battle: The indictment charges Mr. Browder himself applied for and got the passport.

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The Court: I understood he did.

Mr. Battle: He himself presented the passport.

The Court: I understood.

Mr. Battle: As I have said, I think the passage of that Act in 1918 which required a citizen, as a war measure, to present a passport in order to enter or to leave the country, and the repeal of that Act in 1921, after the war was over, is conclusive evidence that excepting during those three years, the passport could not be used and was not used.

The Court: I cannot believe that this statute has any such limit of interpretation as you seek to place upon it.

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Mr. Cahill: There are some cases on page 21 of Mr. Battle's memorandum which I think throw great light on the subject and I cite particularly the case Mr. Battle cites at the top of the page.

Mr. Battle: I am going to get to that.

Mr. Cahill: If I may just continue for a second. I read particularly the quotation from that page. That case refers to this man Baglivo, who was a native born citizen of this country, and it says:

"The fact that Baglivo improperly used a passport which was wrongfully taken from the office of the Consul General in Naples and that he may have com-

76

Motions to Dismiss Indictment.

mitted perjury in his endeavor to gain admission into the United States may afford ground for criminal prosecution. It does not afford ground for the exclusion of one born in the United States, who has never renounced his allegiance thereto."

I will stand on the proposition of law there enunciated.

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Mr. Battle: That is just what I say. If this charge were against Mr. Browder for securing the passport illegally, that would be entirely true, but here the charge is using it, and in this case, in this Baglivo case, the court held that the passport was so immaterial, so useless in respect to securing entry of a citizen into this country, that even the fact that the person presented a fraudulent passport would not be considered. It is the strongest kind of authority that the passport has no function whatever in securing his entry. That was a case decided by Judge Bondy in this court.

In the Circuit Court of Appeals, in the First Circuit, Judge Bingham held, citing the same case:

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"It is evident that, if Camardo, as his evidence clearly tended to show, is a citizen of the United States, the fact that he possessed a fraudulent permit and passport would not be ground to refusing him admission to the country, whether his possession of that was or was not a violation of law."

As I say, if this was a charge against Mr. Browder of having made a false statement, or of having committed perjury in securing this passport, that language would be perfectly applicable, but the significance of those authorities is that the passport itself is so useless, has so little function, no connection whatever with the entry of a citizen into this country, that he would be allowed to enter, even if he presented a fraudulent passport.

Motions to Dismiss Indictment.

79

The cases are perfectly clear, your Honor, on this. It is perfectly clear that the use contemplated in this statute is a use as a passport. It is not a use of the passport as a means of identification within this country, it is a use of a passport in a foreign country where only a passport has proper function and use.

On that point that your Honor raised as to the fact of the difficulty of prosecution in a foreign country, that question has come up in two cases in the Supreme Court. One was the Bowman case, in which a man was in Brazil, who had embezzled the funds of a corporation which belonged to the United States, and his offense therefore was an offense in a sense against the United States, and Chief Justice Taft held in that case.

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"While the legislation of the congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States, the question of its application, so far as citizens of the United States in foreign countries are concerned, is one of construction, not of legislative power."

And then he goes on to hold that where the offense is one against the United States that any statute, any penal statute has jurisdiction and can be applied all over the world, in any country in the world. It says:

81

"Others (i. e., offenses) are such that to limit their locus to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home. In such cases, Congress has not thought it necessary to make a specific provision in the law that the locus shall include the high

Motions to Dismiss Indictment.

seas and foreign countries, but allows it to be inferred from the nature of the offense."

In the Blackmer case, the Court followed that same doctrine. In that case Blackmer was in Paris and he was sought to be punished for contempt of court, and the court held that he could be reached; although he was in Paris and though process was served on him, the Supreme Court held it was valid and he was fined.

83 Mr. Cahill: I must differ right there. I would not like to go any further on that line of argument. The Blackmer question was on the legality in establishing the jurisdiction of the Senate of the United States, and there was a fund in this country which the Government was allowed to levy a fine upon.

The Court: I do not pose the question as finely as you have, but it was rather addressed to the fact that in such a case there would be a very practical difficulty about prosecution, if they had to go and find the evidence in the bowels of Russia. That is the question I raise.

84 Mr. Battle: If your Honor please, the question here is whether this use which the statute denounces is a passport use—a use of this passport as a passport.

The Court: It is a little bit broader than that, whether this statute by its terms was intended to be limited to the particular things that you mentioned. I do not believe that it was. It seemed to me that that would strip it of all its effect entirely. However, I am quite willing to take it under advisement until this afternoon.

Are there any other motions? You mentioned four or five more. I think we had better get them all at once.

Mr. Battle: There is a memorandum on the question of jurisdiction in foreign countries, and I should like also, in addition to the other grounds which I have made, I would like to add this to the grounds: we further respectfully submit that if the statute be construed so as to re-

Motions to Dismiss Indictment.

85

quire a citizen to obtain or use a passport for the purpose of entering into the United States, and that the use mentioned in Section 220 includes the use for the purpose of entering into the United States by citizens of the United States, then the statute upon which this indictment is based is unconstitutional, being in contravention of the principles underlying our Constitution and its Amendments, and particularly the Ninth Amendment.

This motion, if your Honor please, is to dismiss the indictment and for the acquittal of the defendant upon the ground that the indictment does not set forth any false statement. Your Honor will recall that in this— 86

The Court: That has already been argued on that theory this morning and I think the disposition of the first motion you made should properly cover this one.

Mr. Battle: I would like to make them specifically on this ground now.

The Court: Yes.

Mr. Battle: That the statement in the indictment, the alleged false statement in the indictment, is so vague and indefinite, so uncertain and so meaningless, that no charge of falsity can be legally predicated upon it, and conceding that the statement as set forth in the indictment is what must control, there would be only two possible statements. One would be the word "None" and the other would be the words "My last passport was obtained from—None." I respectfully submit that neither one of those is a statement sufficiently definite to have a definitely sufficient meaning to justify any claim of falsity thereon. 87

The cases all hold that in the case of a false statement, or even in perjury cases, there must be a clear, definite statement, some definite meaning, in a penal proceeding, and in an indictment, and here we submit there is no false statement sufficiently definite to bring it under the statute. We submit this indictment should be dismissed and this defendant should be acquitted on the ground that the in-

Motions to Dismiss Indictment.

dictment itself does not set forth any false statement upon which a charge of falsity can be predicated.

The Court: I will deny that motion and give you an exception.

Mr. Battle: All right, sir. The next motion, if your Honor please, is to dismiss the indictment and for the acquittal of the defendant on the ground that it appears on the face of the indictment that the offense is barred by the statute of limitations. It appears on the face of the indictment that this application for the Browder passport was made on August 31, 1934, which, of course, is more than three years before the date of the finding of this indictment.

The Court: The two offenses charged were alleged to have occurred in 1937 and 1938.

Mr. Battle: The use.

The Court: The use. That is the only thing that is being tried and, as I understand it, the whole basis of your argument up to the present time.

Mr. Battle: The use is essential. Use is the climax, but the offense charged consists of very definite elements. One is the making of a false statement itself, and the other is the procurement of the issuance of a passport by reason of that false statement. Both of those are barred by the statute and they are both essential elements. It is not a case of continuing offense, and where two essential, separate and distinct elements are barred by the statute, we submit that the whole offense is barred.

The Court: I will deny that motion and give you an exception.

Mr. Battle: The next motion I have to present to the Court is to dismiss—

The Court: I do not like to interrupt you, but I am afraid I was a little bit hasty in thinking we could dispose of these motions before we had lunch.

Motions to Dismiss Indictment.

91

Mr. Battle: Yes, sir.

The Court: And I am rather wondering if perhaps it would not be a good thing to suspend at this time until this afternoon?

Mr. Battle: That will be entirely agreeable to me.

The Court: May I suggest in the meantime that you give Mr. Cahill or Mr. Dunigan, or both of them, copies of these motions which you are proposing to make.

Mr. Battle: I will do that with pleasure. I have given them copies of those I have already made and I will give them those now that I have to make.

92

The Court: How many more altogether are there?

Mr. Battle: Four.

The Court: We will have to handle the jury the best way we can, I suppose.

We will take a recess until two-fifteen.

(Recess until 2:15 p. m.)

(Afternoon session.)

93

Mr. Battle: If your Honor please, I would like to have it appear on the record that the motions which were made before related to both counts of the indictment. Sometimes I mentioned only one. Each motion was intended to be directed to both counts.

The Court: Yes.

Mr. Battle: I should like to add, as a supplemental ground to the motion to dismiss on the ground that the indictment does not sufficiently set forth any false statement that this indictment is so vague and indefinite in its language and so meaningless that it does not constitute due process under the fifth amendment of the Constitution, and also on the supplemental ground that if the

Motions to Dismiss Indictment.

statute upon which this indictment is based is to be read and interpreted so as to authorize the President and the Secretary of State to proscribe by rule that a person applying for a passport must disclose the fact that he had previously obtained a passport illegally and the rule be construed as making such requirement and the failure to make such a disclosure as a false statement within the rule and the statute, then both the rule and the statute under which it was made would be unconstitutional and in contravention of the Constitution against self-incrimination in the

95 Fifth Amendment.

I move, if your Honor please, to dismiss the indictment and for the acquittal of the defendant on the ground that in this case the renewal, the application for the renewal of the passport of 1934, the passport which was issued on September 1, 1934, to the defendant, Earl Browder, was in effect an application for a new passport, and that that application for the renewal did not contain any allegation in regard to previous passports and that, therefore, there is no violation which can be charged of Section 220.

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In that connection I call to your Honor's attention the fact that in this application for renewal which, together with the application for the original passport, has been stipulated in evidence between Mr. Cahill and myself, and we have also, I may say, entered into a stipulation to the fact that Mr. Browder was born in Wichita, Kansas, and he is and always has been a citizen of the United States, in this application for renewal, your Honor will notice that the form has this clause, "Application and passport submitted for consideration by blank agency on blank date". So that the usual application for renewal contains within it the old passport and the application for the old passport, so that the application for renewal may be considered as a repetition or as a restatement of the grounds charged in the application for the original paper. In this renewal, for some reason that wasn't shown, your Honor

will see from examination here that those lines, "Application and passport submitted for consideration," are stricken out. So this application for renewal does not contain within itself any repetition or restatement of the averments contained in the application for the original passport, and it is just as if there was an application for a new passport based solely on this petition for renewal, which your Honor will observe has no statement in it concerning previous passports, and we submit, therefore, that this application for renewal was in fact an application for a new passport made on an application which does not contain any statement as to previous passports. Therefore—

The Court: I will deny that motion.

Mr. Battle: Will your Honor give me the benefit of an exception?

The Court: Yes.

Mr. Battle: The next motion which I wish to address to the Court is a motion to dismiss the indictment and to acquit the defendant upon the ground, generally speaking, that Section 220 relates only to illegal passports, that is, it relates only to passports issued to persons not owing allegiance to the United States. Your Honor will recall that only passports can be issued to persons owing allegiance to the United States. The language of this section, Section 220, indicates that it applies only to passports issued to aliens, passports which are inherently and are themselves illegal. The section reads, "Whoever shall wilfully and knowingly make any false statement in an application for a passport with intent to induce or secure the issuance of a passport under the authority of the United States, either for his own use or the use of another, contrary to the laws regulating the issuance of passports or the rules prescribed pursuant to such laws, or whoever shall wilfully and knowingly use or attempt to use or furnish to another for use any passport the issue of which was

Motions to Dismiss Indictment.

secured in any way by reason of any false statement, shall be fined or imprisoned." The language of that statute indicates that it applies only to passports which are issued contrary to the laws regulating the issuance of passports, or the rules prescribed pursuant to such laws.

There are only two kinds of passports that are inherently illegal. One is a passport issued by an unauthorized official and the other is a passport issued to someone who has no right to receive it—an alien. There is no question in this case about the authority. So, so far as this case is concerned, the only illegal passport is a passport issued to aliens. This statute, 220, was passed in 1917—June, 1917, just after we went into the great war. It was a war measure. It was intended to prevent the issuance of passports to aliens who could use those passports for espionage purposes, as spies and otherwise, and the language indicates that this section is intended only to apply to passports issued to aliens, because they are the only passports that are issued contrary to the law regulating the issuance of passports or the rules prescribed pursuant to such laws.

If it be said that the making of the false statement would require or would result in a passport contrary to the laws regulating the issuance of passports or the rules prescribed pursuant to such laws, the answer is that such a clause would be entirely unnecessary in that event because the statute itself prohibits and makes illegal the making of the false statement, and the object of the statute, in view of its history, and in view of its language, we submit, is to penalize any person who makes a false statement in an application in order to get a passport for an alien. In this case Mr. Browder was not an alien. He was an American citizen. Therefore, the statute does not apply to us because—

The Court: I am afraid I do not quite follow you. I understood you to say before that the statute, as you interpret it, applied to anyone who wanted to use it in a

Motions to Dismiss Indictment.

103

foreign country, whether he be a citizen or an alien. Now you say it is limited to aliens.

Mr. Battle: Your Honor misunderstood me. I did not make myself clear. I said that the passport could be used—a passport can legally be used—the legal use of a passport is only without the limits of this country, that is, abroad, and, of course, it can be legally used only by a citizen. It cannot be issued to anybody except a person who is a citizen.

My point here is that under the language of this statute, which limits it to passports issued contrary to the laws regulating the issuance of passports or the rules prescribed pursuant to such laws, that that restricts the passports contemplated and included in this section—restricts it to passports issued to aliens.

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The Court: I do not find anything in the language of the statute to support that contention.

Mr. Battle: If your Honor will study the language there and see the words—

The Court: I looked it over very carefully during the lunch hour and I did not find anything in the language to support that contention. You have spoken about 1917 and the history of it, but I do not know anything about that. I will deny that motion.

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Mr. Battle: Your Honor will give me an exception?

I move to dismiss the indictment and for the acquittal of the defendant upon the ground that it appears on the face of the indictment that the alleged false statement was not and could not have been such a statement that by reason thereof a passport was issued. The statement we discussed already, the form of the statement. The fact that it consists of the word "None" written in in that blank in the sentence which reads, "My last passport was obtained from blank on blank and is submitted herewith for cancellation", that is, as we contend, an administrative

Motions to Dismiss Indictment.

regulation. It is not a material averment in the application. Your Honor will see from the sequence of the different items and entries in the application that the first half of it—

The Court:.. Now you are arguing a question of fact, are you not?

Mr. Battle: "No, sir, I am saying the language of it is such, and the context—I will just finish what I have to say on it—it is apparent from the language that that is merely an administrative regulation calling for the presentation and the delivery for cancelation of a passport and, therefore, that it is not an election or any statement by reason whereof the application was issued.

The Court: I understand you to say that the department has no right, really, to ask such a question?

Mr. Battle: No, sir, I say it is not a question. It is simply a statement. That language assumes that a passport was issued and calls for its cancelation, and I submit that it is not a false statement by reason of which the passport was or could have been issued.

The Court: I think the ruling on one of the previous motions is probably sufficient to cover that. I will deny that motion.

Mr. Battle: Your Honor will give me an exception? That is all, your Honor.

The Court: I made no disposition with respect to one of these motions and I will therefore deny that one, which I think was the one in which you asserted that the use alleged in the indictment was not within the language of the statute.

Mr. Battle: Yes, not within the purview or contemplation of a statute.

The Court: I will deny that motion and, of course, give you an exception.

Mr. Battle: Thank you.

Opening For the Prosecution.

109

The Court: Anything more?

Mr. Cahill: No. All I would like your Honor to do is exclude all witnesses from the courtroom during the course of the trial.

The Court: Yes. Where do you want them kept?

Mr. Cahill: There is a witness room, 122, your Honor.

The Court: You are referring only to government witnesses?

Mr. Cahill: I am referring to witnesses for both sides.

The Court: Should they all be put in the one room?

Mr. Cahill: I have no objection to that, your Honor. 110

The Court: I will exclude all witnesses, then, from the courtroom.

(The Clerk announced that all witnesses should retire from the courtroom and remain in Room 122.)

The Court: You had better bring the jury in.

(The jury returned to the courtroom.)

Mr. Cahill: May it please the Court, Mr. Foreman and ladies and gentlemen of the jury, at the outset of every criminal trial it becomes the duty of the United States Attorney, who presents the evidence on behalf of the government, to describe to the members of the jury the nature of the charge or accusation on which the defendant is now about to be tried. 111

It is further the duty of the United States Attorney to outline in a general way to the members of the jury the evidence which the government expects to produce in support of that charge.

The charge or accusation in this case, as in all criminal cases in this court, is brought in the form of an indictment returned by the Grand Jury of this district. The indictment in and of itself has no probative force whatsoever. Its only purpose is to apprise the defendant of the charge made against him and to define the issues between the defendant and the United States Government.

112

Opening For the Prosecution.

Eloquence and oratory have no proper place in an opening, nor is an opening at the same time the place for the government to try its case. Its purpose is merely to outline the charge and the proof, and I intend, on behalf of the government, to adhere to that purpose.

113

Let me say in preliminary fashion, still further, that in the conduct of this, or any other trial, the court and the court alone is the judge as to the law and if at any time during this opening, or during the opening of opposing counsel, any reference should be made to the law, it will only be for the purpose of clarifying the facts and not with any intention whatsoever of invading the exclusive province of his Honor who presides at this trial.

114

Still, further, if in reference to the facts at any time anybody on behalf of the United States should say anything in this trial which is not borne out by the evidence that you hear from the witness chair, you should disregard it, just as much as I would expect you to disregard any statement of opposing counsel as to the evidence which was not borne out by what the witnesses said, because what any lawyer says in this trial is not evidence in any way. The only evidence we get here is from the witnesses as they are sworn.

Further than that, if any counsel makes a statement as to the evidence which does not accord with your recollection of what the evidence was, it is your recollection that governs and nobody else's.

During this opening I do not intend to advert to every item of proof that the government will produce. The purpose is merely to high spot a framework of the evidence to enable you to follow the case more understandingly.

Before going into the evidence in the trial itself, in order that you may get acquainted with the men at the government table, let me say that the gentleman sitting next to me is Mr. Lester C. Dunigan, the Chief of the

Opening For the Prosecution.

115

Criminal Division of my office; next to him is Mr. Robert L. Werner, Assistant United States Attorney and next to him is Mr. Ashley J. Nicholas, of the Department of State of the United States.

Turning now to the indictment, the indictment as you have heard, is in two counts. It names as defendant Earl Russell Browder, who sits at defendant's counsel table, with a mustache and his hand about his face. The charge set forth in each count is the use of a United States passport, the issue of which was obtained by false statement. The first count of the indictment alleges that on April 30, 1937, Browder entered the United States at the Port of New York on a passport secured on an application containing a false statement. The second count charges that Browder repeated this offense on February 15, 1938. With the exception of the difference in the dates of use, which I have pointed out, the one being April 30, 1937, the other being February 15, 1938, the two counts in the indictment, with the exception of the dates, are identical.

116

I might say to you in further preliminary fashion in regard to the evidence in this case that the government has elected and will rely on documentary evidence, and for the very most part the government's case will be based on the papers themselves. The handwritten portion of these papers we will show you is in essential part in the handwriting of the defendant Browder. In presenting the government's case to this jury we will, of course, begin with testimony as to the methods of procedure in the Passport Division of the Department of State of the United States Government, because it is the Department of State of the United States Government that is charged with responsibility as to the issuance of passports.

117

Now the proof is of a kind for which I bespeak your closest attention because it is my opinion that a comprehension of those methods of procedure is necessary for

Opening For the Prosecution.

your understanding of the activities of Browder in regard to the particular passports which Browder obtained. Or to put it in the converse form, the proof as to the methods of the State Department is necessary for your comprehension of how Browder accomplished the crime he is accused of committing in this indictment.

While I shall not go into the detail of that at this time, briefly, when an American citizen applies for an American passport he must comply with two requisites. He must submit proof that he is an American citizen, because American
119 passports are solely for the use and protection of American citizens while traveling. Second, he must produce proof that he is the person who is named in the application for the passport, that is, proof of identity.

Now that is all pursuant to the provision of law which is set forth in Title 22, Section 213 of the United States Code, and with the Court's permission I shall read it in pertinent part. The first paragraph, which is the part we are interested in here, provides "before a passport is issued to any person by or under the authority of the United States such person shall subscribe to and submit a written application duly verified by his oath before a
120 person authorized and empowered to administer oaths. Each said application shall contain a true recital of each and every matter of fact which may be required by law or by any rule authorized by law to be stated as a prerequisite to the issuance of any such passport."

You have just heard from a reading of that section of the law that the application must contain a true recital of the facts, and the facts which the application for passport inquires about have to do not only with the identity of the applicant for the passport, but as well with his relationships by blood and marriage and statements as to his immediate family history. And finally, and most important of all, the application requests a statement as to when the applicant had his last passport. The purpose

Opening For the Prosecution.

121

of this information is to enable the State Department to have before it such data before it invokes the safe conduct which the American passport is supposed to and does guarantee to American citizens. Again, not only is proof by the applicant himself required in connection with the applications for passport, but as well supporting data by way of affidavit of persons who have known the applicant, and still further, data as to his native birth in this country, or in the case of a foreign born person information as to his naturalization.

And lastly, the applications provide for the photograph of the one who is seeking the passport. 122

The proof in this case will show that on three separate occasions Browder obtained passports of the United States on which his picture appeared.

Mr. Battle: Pardon me just a moment. I just wish to reserve my rights. I wish to renew the objection already made in the motion to any statement concerning the Dozenberg or Morris passports, or the applications on the ground that it is immaterial, not within the issues of this case, that it is too remote, that it is highly prejudicial and incompetent.

The Court: Denied.

123

Mr. Battle: I except, your Honor.

Mr. Cahill: Now, the proof will show in this case that on three separate and distinct occasions Browder obtained passports of the United States on which his picture appears and that he obtained those passports under the name, first, Nicholas Dozenberg, born in Russia, so the application states; next, under the name of George Morris, born in Lawrence, Kansas; and next, under the name of Albert Henry Richards, stated in the application to have been born in Oshkosh, Wisconsin.

Our contention on behalf of the government is that Dozenberg is Browder in that passport; that Morris is

124

Opening For the Prosecution.

125

126

Browder in that passport; and that Richards is Browder in that passport. We will show you further that in the Nicholas Dozenberg application the citizenship papers, that is, the naturalization papers of Dozenberg, were produced and were shown to the State Department agency at the time Browder obtained the passport in the name of Dozenberg. We will show further that in the case of the George Morris passport the date of birth given for Morris was May 20, 1891, which in truth and in fact was Browder's own birthday, and that Lawrence, Kansas, which was assigned as the place of this man's birth, was in truth and in fact the place where Browder himself was born, in Wichita, Kansas, on the very date assigned. And, again, in the Richards' application it will be shown that after stating that Richards was born in Oshkosh, Wisconsin, he produced what purported to be a birth certificate of this Albert Henry Richards. I might say that in the Morris' passport the proof as to the birth of Morris was supplied in what purported to be an affidavit of Morris' mother, one Martha Morris, as to the birth of the applicant Morris. We will show that the oath to the statement of this Martha Morris was taken by one J. L. Perrilo, who at that time was, employed in the New York office of the Communist Party. Our proof will further show that in 1921 during the life of the Dozenberg passport—because a passport has an original period of validity of two years and it may be renewed any time within four years of its issue, so that upon the renewal it has a life of a full four years. We will show you that while the Dozenberg passport was still alive Browder was visiting in Moscow, and that again in 1933, during the period of validity of the Richards' passport our proof will again show that Browder was present in Moscow. And, finally, our proof will show in this connection that at none of those times did Browder have any passport of the United States in his own name.

Opening For the Prosecution.

127

Carrying this a bit further, our proof will show that on or about 1933 Browder came the better to be known, and that on August 31, 1934, Browder appeared in person at the office of the Passport Agency of the Department of State and applied for the first time for a passport in his own name, although at that time, you will recall according to the government's contention, he had had these three previous passports in the names Dozenberg, Morris, and Richards, and on that occasion August 31, 1934, Browder gave for the first time the true information as to his native birth in Wichita, Kansas, the date of it, May 20,

128

1891, and the correct facts as to his family in response to questioning on the application. But when Browder came to the all-important question on that application, and I quote "My last passport was obtained from" he answered that question with the same invariable word, that he had answered the same question in each of the three earlier passports, namely, the Dozenberg, the Morris, and the Richards passports. He answered that with the word he had used on each of those occasions and that word was "None".

Now mind you, ladies and gentlemen, I repeat that: on each of these occasions in answering that question on the passport application "My last passport was obtained from" Browder answered the question with the word, the same word each time, "None". Now, the matter of the dates here is important. Bear in mind that on September 1, 1934, he got a passport in his own name for the first time. Now at the time he did that the Richards' passport, which was also a United States passport, was still valid and would continue to be a valid passport until November 19, 1935, for the reason that on November 9, 1933 the Richards' passport was presented at the office of the Passport Agency in Chicago. The office of the Department of State in Chicago had that Richards' passport presented to it, and there the Richards' passport was renewed so as to be effective for the full four years. You will recall that

129

130

Opening For the Prosecution.

the date of issuance of that Richards' passport was November 18, 1931, so giving it its full four years of validity, which is what the renewal did, it would expire beginning on November 19, 1935. Therefore, from September 1, 1934, the date he first got a passport under his own name, until November 19, 1935 Mr. Browder had issued to him two valid passports of the United States—one in the name of Richards and the other in the name of Browder—available for use, either one of them, as he elected and saw fit, both carrying the seal of the United States of America, and asking safe conduct on behalf of our government for one of our citizens. I quote the language of the passport:

131

"I, the undersigned, Secretary of State of the United States of America, hereby request all whom it may concern, to permit safely and freely to pass and in case of need to give all lawful aid and protection to"—

and in the Richards' case, it would be Richards; and in the Dozenberg case, it would be Dozenberg; and in the Morris' case it would be Morris—"a citizen of the United States".

132

Now, I have nearly done. The government will call here on the witness stand persons to prove what we have outlined in this our opening. Further, we will put on the stand a government handwriting expert who will compare the handwriting on all these applications, the Dozenberg, the Morris, the Richards, and the Browder applications, and will testify before you that the handwriting in all of them is the handwriting of the defendant here on trial, Earl Browder. Still further, as to the passport in Browder's own name, which was obtained on September 1, 1934, on the basis of the statement that Browder had no passport before, which is the statement that he had repeated each time that he had "None", we will show you that that passport in his own name was used to enter

Opening For the Defense.

133

the Port of New York on April 30, 1937, that passport, too, having been extended so as to give it validity for a period of four years. And we will show you that that passport was again used on February 15, 1938, to enter this port. We will show you that the first time Browder came in as a passenger on the SS Berengaria and the second time when he came in he came in as a passenger on the SS Aquitania.


Our case, although documentary, will not take long to present. I ask your earnest attention to the proof. We are here to try a passport case and we are going to confine ourselves to the passport issue. We are not going into the motives for the doing of these things, because we are here to try facts, and we intend to stick to the facts and not go into the speculative realm. We will show not only the use of false names, false birth dates, false affidavits as to birth, the use of the citizenship papers of another, but as well that this bulk of applications and fraudulent material was presented for the purpose of obtaining safe conduct of the United States in the form of its passport.

134

We, on behalf of the government, feel that when you have heard all the evidence, the evidence and that alone will convince you of the guilt of this defendant beyond any reasonable doubt.

135

Mr. Battle: May it please the Court, and ladies and gentlemen of the jury. As Mr. Cahill has indicated to you, it is the function of an opening talk such as this to give an outline of what the prosecution expects to prove. And then the defense gives an outline of what its attitude will be. Now it is manifestly impossible for the defence to tell in advance just what it expects to do until the end of the prosecution, until we know what the prosecution is going to be. We don't know what that is going to be, and, of course, we will have to be guided and directed according to how the evidence for the prosecution develops.



Opening For the Defense.

And so I can't, and I shall make no effort, to state to you in detail now just what all the facts will be in regard to the defense. It would be impossible. But there are certain points which I can bring to your attention and which are, I think, of the utmost importance.

137 In the first place, it is essential at the beginning for you ladies and gentlemen to understand just what it is that you are trying here. You are not engaged in a general investigation as to what names may have been used in the issuance of passports. You are engaged in trying a specific charge, a specific issue; and that issue, the charge, is set out in the indictment and you have to determine whether the prosecution proves beyond a reasonable doubt—to your satisfaction beyond a reasonable doubt whether the prosecution has substantiated those charges.

138 Now, there is not a word in the indictment nor is there a word in any charge about any other name being used other than his own by the defendant. The charge in the indictment is this, and it is very simple and direct, and I ask you, ladies and gentlemen, to keep your attention directed on that all through the introduction of the testimony, as to just what this man is being tried for, because that is the only thing that you, of course, will have to determine. He is being tried not, as I say, for using any other person's name in any application for a passport; he is being charged with having used in order to obtain entrance into this country first on the 30th of April, 1937, and after, as I recall the date, on the 15th of February, 1938, with using a passport issued in his own name, issued to himself, a passport in which he described just who he is. And he is being charged with using that passport to obtain his entrance—to secure his entrance in this country. That is all that he is charged with. It is charged in the indictment that this passport which was issued to himself, issued on his own application, that this passport was presented by

Opening For the Defense.

139

him to an immigration inspector and that he thereafter landed in this country. Now the false statement which he is alleged to have made does not relate in the least to the use of any other name. Mr. Cahill and I have stipulated as to the application which Mr. Browder made for this passport. That application was made on August 31, 1934, and it was on that application that a passport was issued to him on the following day, September 1, 1934. And it was renewed thereafter, and we have stipulated as to those applications, the application and the renewal, and they are both before you, and with the permission of the Court I would like to hand each one of the jury a copy of this photostat.

140

Mr. Cahill: I think we ought to wait for the proof to go in in an orderly fashion.

Mr. Battle: I can show this to them or I can—

The Court: What is it? The application?

Mr. Battle: I would like to ask permission of the Court to give the jury a photostat of this application.

The Court: Which application is it? The one of 1934?

Mr. Battle: The one of 1934, yes.

The Court: I can see no reason why you should not.

(Mr. Battle handed a photostat to each juror.)

141

Mr. Battle: Now, you will see here from this application which was dated on August 31, 1934, and on which the passport was issued, as you will see by the stamp up at the righthand side, on September 1, 1934, that Mr. Browder said:

"I, Earl Russell Browder, a Native Citizen of the United States, hereby apply to the Department of State, at Washington, for a passport. I solemnly swear that I was born at Wichita, Kansas, on May 20, 1891; that my father William Browder was born at Kentucky and is now residing at 1601 No. Morrell, Englewood, Missouri.

Opening For the Defense.

"I am domiciled in the United States, my permanent residence being at 2714 Wallace Avenue in the City of New York, State of New York."

143

And may I call your special attention to this next sentence, as this was before any writing was put on the application blank, as it was originally when it was given to Mr. Browder, one of these questionnaires with which we are unfortunately too familiar with now. Many of my friends complain to me that now about all they do is sign questionnaires. When this questionnaire was given to Mr. Browder it read this way: "My last passport was obtained from blank on blank." Now that is all that is mentioned in the indictment. "My last passport was obtained from blank on blank", and that is all Mr. Cahill mentioned in his address to you. But you will see that that is not all of that sentence. That sentence goes on: "My last passport was obtained from blank on blank and is submitted herewith for cancelation." There is no question asked there. There is no statement as to whether or not he had had a previous passport. He is not asked to state that at all. It is simply an assertion, "My last passport was obtained from blank on blank and is submitted herewith for cancelation".

144

Now these averments, these allegations that I read to you are not, up to this one here about "the last passport", questioned. It is conceded by stipulation between Mr. Cahill and myself that Mr. Browder was born in Wichita, Kansas, on May 20, 1891, and that he is and always has been an American citizen, and that his father was an American before him. This is not a case of any foreigner, an alien coming in here. This is a man of American descent coming from the State of Kansas, which is perhaps the central state of the Union. Now, the head and front of his offense, the whole thing that is charged against Browder

Opening For the Defense.

145

here is writing in this word "None" in this blank. "My last passport was obtained from blank on blank and is submitted herewith for cancelation." We claim that the purpose of that statement in this application was to call for the production of the document, the passport itself, for cancelation. There is no question there as to calling on him to state whether there had been a previous passport or when it was issued, if there were any. And that is what he is charged with. That is the false statement. There is no charge that he made any oral false statement, no charge that he said anything false. The charge is a writing of the word in in that sentence there, and it is for you, ladies and gentlemen, to determine whether the writing of that word "None" in that one passage is a criminal offense or an act that caused him to be guilty of a criminal offense for which he could be sent to prison.

146

You will notice that the first part there, the first allegations, which are not questioned, relate to his citizenship. This question here is an administrative regulation—the question about the last passport. And the object of it is evident. It called upon the person making the application to submit for cancelation the previous passport document if he had it. If he did not have it, if he hadn't kept it, if it had been lost, if for any reason it had been destroyed he couldn't, of course, produce it, and that is all that that sentence calls for, for the production of that passport document for cancelation, as we submit, a mere administrative regulation. You will see that Mr. Browder went on and stated there his description—brown hair and blue eyes, no distinguishing marks or features. He wrote the word "none" after "Distinguishing marks or features".

147

"Place of birth: Wichita, Kansas.

"Date of birth: May 20, 1891.

"Occupation: Journalist.

148

Opening For the Defense.

"I intend to leave the United States from the port of New York sailing on board the Il de France on Sept. 8, 1934."

149

150

And there is the affidavit of his brother and there is his own photograph. There is no attempt whatever in any way to disguise his identity, no attempt whatever to travel incognito under the name of any other person, and we shall show you also that in 1938, in September, 1938, four years after this application, we will show you first that he made this application in 1934 under his own name, that he made the renewal. He renewed that application in February, 1937. This first passport that had issued on September 1, 1934 died and became void in September, 1936, and on the 2nd of February, 1937, as I recall it, Mr. Browder made an application to renew that passport. He made that application in his own name and we have that here and that will be put in evidence before you, the application showing that he made the application in his own name, showing that he made the original application for a passport in his own name, and he made the application for the renewal in his own name. And we shall show you that in September, 1938, he went down to Washington and applied there again under his own name, giving the same facts that he gives here, and another passport was issued to him in 1938 under his own name. We will show you that in 1934 he made an application under his own name for a passport which was issued to him. In 1937 he made an application for the renewal of that passport in his own name, and on that application the passport was renewed. We will show you that in September, 1938, he made still another application for another passport under his own name, giving the same facts and the same photograph and in no way attempting to disguise his identity. So from 1934 there is no claim here of any kind that from that time, 1934, six years ago, he has used

Opening For the Defense.

151

any name except his own. During that time he has made an application for passport, an application for renewal, and an application for another passport. And in every instance that application was made in his own name telling the truth about himself, telling the fact of his being a native born American citizen, which he is, his father having been born before him in this country, and the truthful facts as to his age, as to his description, his photograph, everything perfectly open and above board for the last six years.

Now what do they say is the false statement on which this charge is based? "My last passport was obtained from 'none' on blank and is submitted herewith for cancellation". And you will see that that sentence ends there, and that is the statement that they say is false. 152

As I understood from Mr. Cahill's opening they will claim that that was a statement that he had no last passport or that he had no passport. The indictment charges, and Mr. Cahill repeated it, that the last previous passport before he signed this statement was a passport issued to him in 1931 under the name, or incognito name of Albert Henry Richards. We do not deny that in 1931 a passport was issued to him under the name of Albert Henry Richards. We don't deny that he used that passport. It is in evidence here that he is an official of the Communist Party, and it is in evidence here that he went abroad from time to time. Now it is perfectly obvious, and I don't think we need any proof to show, that a member or an officer of the Communist Party in going abroad and going through those troubled countries in Eastern Europe might very well meet difficulties if he was traveling under his own name. A man known to be the secretary of the Communist Party might have all sorts of difficulties put in his way, and that affords a very sensible reason for a man not wanting to travel under his own name. 153

154

Opening For the Defense.

Mr. Cahill: I think, your Honor, that this is very much an argument. In the opening I think counsel should confine himself to what he intends to show, not a justification. I submit that that is argumentative.

The Court: I suppose that is so.

Mr. Battle: I am just calling attention to what we expect to call their attention to when the time comes for us to go into the trial of this case.

155

And I do call your attention to the fact that it is a charge in the indictment, and we don't deny it, that a passport was issued to Mr. Browder in 1931, nine years ago, under the name of Albert Henry Richards, and that he traveled under that name.

The prosecution claims that that is the last passport before this application of August, 1934. The indictment charges that that was the last passport. Mr. Cahill, the United States Attorney, states that was the last passport and we state that that is the last passport. So that we are all in unison on that, that in 1931 that was the last passport. Now I submit that that is all that can be put in evidence here—

156

Mr. Cahill: I object to that, your Honor. That is for the Court to rule upon, not for counsel.

The Court: I think that is true.

Mr. Battle: Yes. I will call your attention to the language of this section: "My last passport was obtained from blank on blank and is submitted herewith for cancellation", and I call your attention to the fact that no other passport except "my last passport" is mentioned therein. That is the charge that is made against him here and the only charge. There is no charge here that he impersonated anybody; no charge here that he defrauded anybody. The only charge is that in this application he wrote this word "None" when this questionnaire was handed to him. We shall show you, as I have said, that he is an American citizen, a man of family, wife and

Opening For the Defense.

157.

children. We shall show you that he was born in Kansas. His father was born in this country. He comes from American stock. He is no foreigner coming in here from abroad. When the evidence for the government is all in, then I am going to call your attention again to what the facts are in this case, and I will call your attention again to the facts that I have called your attention to here, and it will be proved beyond any question, because it is by stipulation, the fact is that the only charge against him is writing in this word "None" in this sentence: "My last passport was obtained from blank on blank and is submitted herewith for cancelation." That is an essential part of that sentence although it is omitted, for some reason, in the indictment; and Mr. Cahill did not mention it in his opening. And we claim on that flimsy, uncertain, vague, and meaningless concatenation of words "My last passport was obtained from 'none'" that there can't possibly be any charge made under these circumstances, and on the proof I have outlined, on the proof that shows that for the last six years this man has been getting passports under his own name and traveling under his own name and giving a full description of himself, going down to Washington and discussing matters with the officials, we claim under that proof that we are entitled to a verdict of not guilty at your hands.

158

159

The Court: I think we might take a recess for a few minutes.

I expect to adjourn this afternoon at four o'clock; I have another hearing. Have you one witness that you could put on?

Mr. Cahill: Yes.

(Short recess.)

160

Charles Siegel—For Government—Direct.

CHARLES SIEGEL, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Werner:

Q. Mr. Siegel, what is your occupation? A. I am chief of the Passport Section of the Division of Communications and Records, State Department.

Q. How long have you held that position? A. Twelve years or more.

161

Q. What were your duties? A. Well, I have under my supervision all the passport records as well as correspondence concerning citizenship of American citizens dating from 1906 to the present date. We record all this correspondence and these various forms of applications and conduct research in connection therewith.

Q. In connection with your duties have you supervision over the files containing applications for passports and correspondence and other documents in connection with applications for passports and their issuance? A. That is true.

162

(Papers marked Government's Exhibits 1, 1-A, 2, 3 and 3-A for identification.)

Q. Mr. Siegel, will you explain to his Honor and the members of the jury just how passport applications are classified? A. Prior to April 1st, 1925, the passport applications were filed for reference purposes according to the serial number under which the passport was issued, and solely under that number with the cross reference card under the name. Subsequent to that period the passport applications and every form of correspondence arising in any specific case was filed together under the name preceded by the 130, which is a decimal filing system number.

Q. And approximately how many passport applications

Charles Siegel—For Government—Direct.

163

are there in the files of the Department of State? A. Approximately nine million.

Q. Now, in seeking a given passport application or in checking an application are these nine million applications graded by anything other than name and prior to 1925 by number? A. There is a cross reference card merely giving the birthplace and birth date, but there is no descriptive information given.

Q. Is there any cross reference card with respect to the handwriting on a given application? A. There is not.

Q. Is there any cross reference card with respect to any particular applicant, as to whether he has a mustache or has not a mustache? A. No, there is not.

Q. So that in getting an application for a new passport, the only thing you have to go on is the name? A. That is correct.

Q. And any other information which may be contained on the application which is presented? A. That is right.

Q. I show you Government's Exhibits 1, 2, 3 and 4 for identification, and ask you if they are applications and accompanying papers made to the Department of State for a passport? A. Exhibit 1 is. So is Exhibit 2. Exhibit 3 is. I assume this is the application in question.

Q. Well, Exhibit 4 is the whole book, Mr. Siegel. Does that contain applications for passports for the time previously specified? A. That is true.

Q. And all these exhibits, are those kept under your supervision? A. Yes, sir.

Q. Will you also look at Government's Exhibit 1-A, Mr. Siegel, and tell me if that comes from the files? A. Yes, it does.

Mr. Werner: I offer in evidence Government's Exhibit 2 for identification. Is there any objection?

Mr. Battle: It is already in evidence. We have already stipulated it in evidence. We have no ob-

164

165

166

Charles Siegel—For Government—Direct.

jection to its being marked again. It is the same thing that the jury saw.

(Government's Exhibit 2 for identification received in evidence.)

Mr. Werner: Government's Exhibit 2 in evidence, ladies and gentlemen, is the passport application previously referred to by Mr. Battle in the name of Earl Russell Browder.

The Court: Is that the application of May, 1934?

Mr. Werner: September 1st, 1934, your Honor.

167

Mr. Battle: The application was made August 31st.

(Government's Exhibit 4 for identification received in evidence.)

Mr. Werner: Just to keep the record straight, the book, Exhibit 4, is now being marked, and that is the book which Mr. Siegel has testified concerning.

The Court: What is the book?

168

Q. What is the book, Mr. Siegel? A. The book is the passport applications prior to April 1, 1925. They are bound together for the sake of convenience. It is easier to store them that way because they are not quite as active for reference purposes as those subsequent to that time, and we found that it is practical to bind them up in volumes consisting of approximately 200 to approximately 225 applications to the volume. It is only done for the sake of saving active space.

(Papers marked Government's Exhibits 6 and 7 for identification.)

Q. I show you Government's Exhibits 6 and 7 for identification and ask you if they are from the files of the passport division? A. They are both from the files of the passport division.

Charles Siegel—For Government—Direct.

169

Q. And is Government's Exhibit 6 for identification a renewal application on a passport? A. That is correct.

Mr. Werner: I offer it in evidence.

Mr. Battle: Is that the application for the renewal of the passport, September 1, 1934?

Mr. Werner: Yes.

Mr. Battle: There is no objection. That has already been stipulated to.

(Government's Exhibit 6 for identification received in evidence.)

170

Q. And is Government's Exhibit 7 for identification a letter which was received by the passport division in connection with the application of Earl Browder for a renewal of the passport in his own name? A. That is correct.

Mr. Battle: No objection.

Mr. Werner: I offer Government's Exhibit 7 for identification in evidence.

(Government's Exhibit 7 for identification received in evidence.)

Q. I show you Government's Exhibit 5 for identification, Mr. Siegel, and ask you if that is a passport of the United States? A. Yes, it is.

171

Q. And is Government's Exhibit 5 for identification the passport that was issued upon the application of Earl Russell Browder, which was executed August 31, 1934, Exhibit No. 2 in evidence, and renewed by Exhibit No. 6 in evidence? A. That is correct.

Mr. Werner: I offer Government's Exhibit 5 for identification in evidence.

Mr. Battle: Is that the passport?

Mr. Werner: Yes, sir.

172

Charles Siegel—For Government—Direct.

Mr. Battle: No objection.

(Government's Exhibit 5 for identification received in evidence.)

Mr. Battle: Have you any objection to showing that passport to the jury?

Mr. Werner: None whatsoever, I just want to ask one more question.

173

Q. Mr. Siegel, prior to the time that the passport, Government's Exhibit 5 in the name of Earl Russell Browder was issued upon the application Government's Exhibit 2 in the name of Earl Russell Browder, had there ever been a previous application made to the Department of State for a passport in the name of Earl Russell Browder or had there ever been any request of any sort made to the Department of State for a passport in the name of Earl Russell Browder?

Mr. Battle: I object to that, if your Honor please.

The Court: Overruled.

Mr. Battle: Incompetent, immaterial and the witness can't possibly answer it of his own knowledge.

174

The Court: The question I understood is addressed entirely to the records of his department.

Mr. Werner: That is right.

Mr. Battle: I except.

A. I can state from personal examination of the records that there is no such record.

Q. There never was a previous application, never one previous to Government's Exhibit 2? A. That is correct.

Mr. Battle: I object to the form of the question.

The Court: I will sustain the objection. No record of any previous application in his own name I understand is the testimony; is that right?

Charles Siegel—For Government—Cross.

175

The Witness: That is right.

Mr. Battle: And I object to that as incompetent and immaterial.

The Court: Overruled.

Mr. Battle: Take an exception.

Q. And have you made a personal search of all the records of the Department? A. I have made such search.

Mr. Werner: This is an application. This is the passport. This is the renewal application.

176

If I may, Mr. Battle, I would like to call the jury's attention to the fact that the immigration stamps appearing opposite the photographs bear the dates August 31, 1934, and February 2, 1937.

Mr. Battle: And there are other dates, April 30th, and February 15th.

Mr. Werner: There are a number of dates, but I wish to call attention to the two specified in the indictment.

Mr. Battle: We have no objection to that.

Mr. Werner: You may cross-examine.

Cross Examination by Mr. Battle:

177

Q. Mr. Siegel, have you got the application for passports in September, 1938? A. Yes, sir, they are under my supervision.

Q. Have you got them here with you? A. No, sir.

Q. Did you look among your records for September 26, 1938, to see if there was an application for passport there by Earl Browder?

Mr. Cahill: Objected to as immaterial. The testimony on direct here is limited as to an application in Browder's own name prior to the passport of

178

Charles Siegel—For Government—Cross.

September 1, 1934, and that is the charge we are trying. What may have happened subsequent to that time is immaterial.

Mr. Battle: I want to show that in 1938 this man made an application in his own name.

The Court: That is after February 15th, 1938?

Mr. Battle: Yes, sir.

The Court: I sustain the objection.

Mr. Battle: Exception...

179

Q. Did you look for any such document?

Mr. Cahill: I repeat my objection.

The Court: Objection sustained.

Q. What did you say your position was? A. Chief of the Passport Section of the Division of Communications and Records.

Q. Here in New York? A. No, sir, State Department in Washington, D. C.

Q. State Department? A. Yes, sir.

180

Mr. Battle: That is all.

The Court: I think we had better adjourn at this point until tomorrow morning at half past ten.

(Adjourned until Thursday, January 18, 1940, at 10:30 A. M.)

New York, January 18, 1940, 10:30 A. M.

(Trial resumed.)

Mr. Werner: Mr. Hughes, please.

Mr. Battle: If your Honor please, I would like to recall the witness Siegel just for two or three

Charles Siegel—For Government—Recalled, cross.

181

questions on cross examination. I understand he is still here.

Mr. Werner: He is still outside.

CHARLES SIEGEL, recalled.

Cross Examination (Continued) by Mr. Battle:

Q. Mr. Siegel, as I understood your testimony yesterday, you said that prior to April, 1925, that the different passport applications were classified according to number, is that correct? A. Prior to April 1st, 1925, all passport applications were bound up for convenience sake into volumes and they were filed according to number rather than according to name, with a cross reference card made in order to be able to identify applications by number.

182

Q. How were they classified according to number? A. Well, necessarily in the course of the day a great many applications of different names would be issued, and the numbers would run consecutively but the names would not. So that they had to be filed according to the number under the system existing at the time those applications were bound.

183

Q. In other words, the applications were put together consecutively? A. Yes, sir.

Q. As the different numbers ran on? A. That is correct.

Q. Then they were bound up in that order? A. That is correct.

Q. Then you say there was a cross system of cross notation? A. There is an indexing system.

Q. Describe that to us. A. The index system is a system of card indexes on which the name of the individual was given and the passport number and the date only. That is

184

Charles Siegel—For Government—Recalled, cross.

an old system. The more modern system is just a little bit more comprehensive.

Q. Was the name and the number brought together by that cross index system? A. In order to ascertain whether a passport application existed on a certain individual it was necessary to search the index first.

Q. If you got the name, that would indicate the number also, and there would be a notation of the number? A. Yes.

185

Q. So that if you got the name you could locate the passport? A. Yes.

Q. That existed up to April, 1925? A. April 1st, 1925.

Q. After April 1st, 1925, what was the change? A. There was a little more comprehensive information given on the index record and that was to give the individual's complete name, the birthplace, the birth date, and his residence in the United States or abroad as the case may be, and the date on which the application was recorded, made of record in the department.

186

Q. Was there a change in the regulation in the Department about that time, requiring this additional information about where the applicant resided and so on? A. I am speaking now only of what I learned subsequently from the time this was established, and it was merely for the sake of convenience necessarily as the index and file grew from two million names to nine million at the present time. It was necessary in order to speed up the handling of these applications. Just a little more information was necessary on those cards to identify a person quickly in order to obtain their file.

Q. What was the change in the system of filing and cross indexing after April 1st, 1925? A. The change was to give just a little more information on the record card.

Q. Were the applications still filed according to number? A. Subsequent to that period?

Charles Siegel—For Government—Recalled, cross.

187

Q. Yes. A. No, sir; they were filed according to the name.

Q. And was there a cross index giving the number? A. No, sir.

Q. So that after 1925, if you looked for a certain name of an applicant for a passport and found that name, you could locate the application? A. I didn't understand your question.

Q. I say, after 1925, if you were looking for an application made under a certain name, the name of a certain applicant, you could find that in the index? You could find the name? A. Yes, sir.

188

Q. And from that you could locate where the application was? A. That is correct.

Q. But there was no index by which you could look at a number after 1925? A. Not within my jurisdiction. There is such a system.

Q. Where is that? A. That is located in the passport division and those records are not resorted to except in cases where we can't readily identify a case according to the name.

Q. But there is a record kept according to the number in the passport division? A. Yes, sir.

Q. And in your division you would keep a record according to the name? A. Well, we actually maintain the records of that also, but they are not resorted to except in unidentifiable cases from the name alone. In other words, we know a certain passport number, but we don't know the name of the original holder of that passport.

189

Q. If you knew the number of the passport but didn't know the name of an applicant, could you locate the passport and the application under your present system? A. Yes, sir, we could resort to the old records that we have.

Q. But in the case of a record since 1925? A. Well, that is maintained up until within a period of one or two years. That is what we call current dates. That is main-

190

Charles Siegel—For Government—Recalled, cross.

tained in my office. But within that period it is carried in the passport division.

Q. So that in the passport division there is a system of filing and cross indexing according to number still?

A. That is in connection with the actual passports issued. They don't have a cross index. I think it is just merely a list of names and the passport number.

Q. What is your arrangement as to how or as to what is done with the applications themselves, the papers that constitute the applications, where are they kept? A. They are within my jurisdiction.

191

Q. Are they kept in an envelope or filed? A. No, sir, they are maintained in what you call an open file and filed according to the dictionary arrangement or alphabetical arrangement.

Q. Are they bound up? A. Not since April 1st, 1925.

Q. They are simply kept loose? A. That is right.

Q. How many of them are there? A. There are approximately nine million.

192

Q. How do you keep them separate? How do you keep them in order in any way unless they are put in a file or unless they are bound? A. Well, those in the file are maintained—they are filed in the regular filing cabinet and the name appears at the top of the paper—the top edge of the paper where the name is indexed on the side of the application and we examine the records that way in order to obtain a certain case.

Q. If it develops that an applicant has had passports issued to him for one reason or another under more than one name, would those passports issued to one man under different names be kept together in a file? A. If we knew that it was the same person we probably would transfer it to the individual's correct name, that is, where there is a slight variation. It occurs where a man may not sign his name with the same initial twice, or he may use his front initial once.

Charles Siegel—For Government—Recalled, cross.

193

Q. Assuming that a man had his name changed by order of a court and had one application under his own name and a second application under his new name, would they be kept together in the one file? A. The new application, if it contained a court order, would justify us in removing the old application and transferring it to the new name and filing them together.

Q. So that in that case it would be filed together? A. That is right.

Q. Suppose there was no court order but for one reason or another the man wanted to use another name and the Department knew it, would they then be filed under one name? Would the applications be filed under one name? A. No, sir, not necessarily. It depends on the attitude the Department assumes in that particular case.

194

Q. Sometimes it would be and sometimes it would not be? A. My office would not be the one to decide. It would be up to the passport division.

Q. Who is the head of the passport division? A. Mrs. Shipley.

Q. Mrs. Ruth Shipley? A. Yes.

Q. She is the one who determines in the case where a passport is issued to one man under more than one name, whether they should be put together in one file? A. That would be anyone who was doing that particular line of work; not Mrs. Shipley personally.

195

Q. But it would be under her jurisdiction and control? A. Yes, sir.

Q. These applications that you produced here yesterday under the name of Dozenberg and Morris and Richards, where did you get them from? A. They were obtained from my regular file with the exception of the one in the bound volume which is not within my—within what we call our live file.

Q. That was in your regular file? A. Yes, sir.

Q. Was that under the control of Mrs. Shipley? A. No.

196

Charles Siegel—For Government—Recalled, cross.

Q. Simply under your own control? A. Well, our activities are coordinated, but they have no direct connection.

Q. These particular applications that you produced yesterday, though, they were in your regular files? A. That is correct.

Q. And they are accessible to everybody, aren't they? A. I don't know what you mean by everybody.

Q. Anyone who wants to see them can come in and make an application to look at them and look at them? A. Not within my jurisdiction. That has to be done through the passport division. I have no authority to show them to anyone, but officials of the department.

197

Q. Who has the right to give permission for anyone to come and look at them? A. Mrs. Shipley.

Q. If anyone wanted to look at those applications, they would go down and make an application to Mrs. Shipley's division? A. That is correct.

Q. And then they would come down and look at them? A. Either that or she would send for the paper.

Q. That is being done very frequently? A. Yes, sir.

Q. In fact, it is being done all the time? A. Yes, sir.

198

Mr. Battle: Your Honor, I want to renew my objection as to whether there is not an application on file for a passport issued in 1928—

Mr. Cahill: Not 1928; 1938.

Mr. Battle: In September, 1938. And I do that for the reason that it is now apparent that they are going to offer in evidence these applications under these three names. Under those circumstances I think I have a right to object to its introduction. The application applied for in 1934, a passport under his own name was issued. The passport was issued under his own name. And it is in evidence that two years later he applied to renew in 1937 in his own name, and that the renewal was issued

Charles Siegel—For Government—Re-direct.

199

in his own name. And then in 1938 he again applied in his own name and a passport was issued.

Mr. Cahill: I press the question.

The Court: I adhere to my ruling.

Mr. Battle: I except. That is all.

Re-direct Examination by Mr. Werner:

Q. Just one or two questions. Mr. Battle asked you with respect to the files prior to 1925, whether if you have the name you could find a passport and you said yes. Do you mean that you could find the passport or the passport application? A. Probably in my haste I said that I understood him to say passport application, but it is passport application, of course. 200

Q. And you can only find the passport if the individual has turned it in, is that correct? A. That is correct.

Q. You also referred to the filing system since 1925 and you referred to the name index. I show you Government's Exhibit 2 in evidence and call your attention to the right hand side of the front page where "130, Browder, Earl Russell" is written, and I ask you if that is what you meant by the name index? A. Yes, sir, that is correct. 201

Q. And the applications are placed on the end and by thumbing through them you have an alphabetical index of the names? A. That is correct.

Q. With respect to a change of names, Mr. Siegel, when the passport division learns that a change in name has been made, is that cross-indexed? A. That is right.

Q. Is there any cross-index card for a change in name or an application to change the name of Earl Russell Browder? A. I would have to see that application.

Q. (Handing paper.) You are now looking at Government's Exhibit 2 in evidence.

Mr. Battle: Which one is that, Mr. Werner?

202

Charles Siegel—For Government—Re-cross.

Mr. Werner: That is the original Browder passport application.

A. There is nothing on here that would indicate that any such change was requested or made.

Mr. Werner: Thank you.

The Court: That is all, Mr. Siegel.

Mr. Battle: Just one question.

203

Re-cross. Examination by Mr. Battle:

Q. Referring to this original application, the so-called Browder application, August, 1934, I see a number at the top here, 130. What is that number? A. That is the decimal filing system number. The State Department necessarily handles all subjects, not only matters pertaining to citizenship, but matters relating to international relationships, and we have a very fine decimal system to take care of any situation that arises so that subsequently when the search is to be conducted it can be readily found. This refers to citizenship in the United States, or it has been accepted for a passport. And all passport applications, all forms of applications concerning citizenship and passports of American citizens are filed since April 1st, 1925, under this system.

204

Q. And that 130 indicates that that application was made by an American citizen and the passport granted to an American citizen? A. Not necessarily so. In some cases the passport is not issued, but the application remains as a permanent part of the file.

Q. What does that number mean so far as this application is concerned? A. That is an application for passport of an individual who claims to be an American citizen.

Q. An application made by someone who claims to be an American citizen? A. That is correct.

Charles Siegel—For Government—Re-cross.

205

Q. And that is made as an application of an American citizen? The application is made by an American citizen?

A. That is the assumption. Of course, after the evidence is considered it may be the passport may be refused and of course that has no bearing on the number.

Q. After the evidence is considered and if the Department determines that the applicant is an American citizen, then the passport is issued to him? A. Yes, sir. .

Q. So that the issuance of a passport is evidence that the Department has determined that he is an American citizen? A. Well, I can't of course answer technically on that, because that is not within my province.

206

Q. But it is the fact that the passport is issued only to persons owing allegiance to the United States?

The Court: Claiming to owe.

A. Yes, sir, that is right.

Q. I notice on this application this notation—

Mr. Werner: Mr. Battle, I don't like to interrupt you, but would you identify that for the record as Government's Exhibit 2.

Mr. Battle: This is Government's Exhibit 2, the original Browder application, which is dated August 31, 1934.

207

Q. I notice on here this notation: "Department of State, Washington, Amended November 26, 1937, to read, 'The bearer is a newspaper correspondent assigned to Spain and his passport is valid for travel in that country,' by authority of the Secretary of State, R. Shipley." That is the Mrs. Shipley to whom you referred?

Mr. Cahill: The Government intends to go into all these notations with every witness who comes

208

James Joseph Hughes—For Government—Direct.

from the particular division that is concerned with the particular notation. It is better to query them than to ask this man, who has nothing to do with that. If there is anything left untouched that Mr. Battle wants to inquire about, we intend to call these men back. But we intend to go into all of these things.

Mr. Battle: This is a notation on the exhibit offered by the Government.

Mr. Cahill: I understand.

209

The Court: He doesn't know any more about it than appears on the record itself.

Mr. Battle: I am going to ask him that.

The Court: Mr. Cahill says that someone who knows more about it than he does will be called upon. You may reserve that question.

Q. Do you know the handwriting that appears in that amendment dated November 26, 1937? A. Offhand I can't say. I wouldn't really be in a position to know.

Q. Have you any opinion? Can you state whose it is, in your opinion? A. No, sir.

210

Mr. Battle: That is all.

JAMES JOSEPH HUGHES, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Werner:

Q. Mr. Hughes, what is your occupation? A. United States Assistant Passport Agent at New York.

Q. And how long have you been passport agent? A. Assistant agent since 1924. Agent since 1919.

James Joseph Hughes—For Government—Direct.

211

Q. And what are your duties briefly? A. At the present time supervising the Rockefeller Center passport agency.

Q. How long have you been supervising the Rockefeller Center passport agency? A. Since 1936.

Q. Prior to that what were your duties? A. Assistant passport agent at the Sub-Treasury Building, at the downtown section.

Q. In the course of your duties, Mr. Hughes, are applications for passports executed before you? A. They are.

Q. And have you authority to administer an oath? A. I have.

212

Q. Both with respect to the applicant and the identifying witness on the passport application? A. I have.

Q. I show you Government's Exhibit 2 in evidence, a passport application in the name of Earl Russell Browder, and ask you if that application was executed by you. A. It was.

Mr. Battle: If your Honor please, we have conceded the execution of that application. It has been stipulated in evidence. I object to the question to the witness on the ground the application is in evidence and that it itself is the best evidence.

213

The Court: No, I will let him testify.

Mr. Battle: I except.

Q. Mr. Hughes, approximately how many passport applications have been executed before you since you became an agent of the Department of State? A. That would be pretty hard to estimate. I would say a great many thousands.

Q. And have you any recollection of Government's Exhibit 2 being executed before you? A. Only the fact that my signature appears in two places.

Q. That is, after the signature of the applicant and after the signature of the identifying witness? A. That is right.

214

James Joseph Hughes—For Government—Direct.

Q. Now, Mr. Hughes, is it necessary for both the applicant and the identifying witness to appear in person at the passport agency? A. It is.

Q. And is it also necessary for the applicant to present proof of citizenship? A. It is.

Q. Can you tell from looking at Government's Exhibit 2 in evidence what proof of citizenship was presented by Mr. Browder, the applicant in that case? A. I can.

215

Q. Will you state? A. In this case the brother of the applicant appeared and attested to the applicant's citizenship.

Q. And did you affix a stamp to Government's Exhibit 2, indicating that fact? A. I did.

Q. What is the brother's name, Mr. Hughes? A. William E. Browder.

Q. Now, what is your procedure, Mr. Hughes, when an applicant for a passport appears before you? A. The first thing is to check—

Mr. Battle: What was your procedure at that time?

216

Q. Well, what was your procedure at the time Government's Exhibit 2 in evidence was executed before you, and what is still your procedure with respect to when an applicant for passport appears before you? A. The procedure always has been and still is to check the application thoroughly for any omissions and then to ask the applicant if they have ever had a passport.

Mr. Battle: I object to that, if your Honor please. I object to any general procedure.

Q. Is that procedure always followed, Mr. Hughes? A. I have never—

Mr. Battle: Wait a minute. I object.

James Joseph Hughes—For Government—Direct.

217

The Court: Objection overruled.

Mr. Battle: I object to it as incompetent, immaterial, it is not in any way binding on the defendant.

Q. Is that procedure always followed by you, Mr. Hughes? A. Always.

Mr. Battle: I except to your Honor's ruling.

Q. Can you tell by looking at Government's Exhibit 2 in evidence what answer the applicant gave you when you asked that question? .

218

Mr. Battle: I object, if your Honor please. A hypothetical question like that? The charge here is that this defendant made a false statement by writing in that word "None." There isn't any charge that he made any oral false statement.

The Court: I understood. There is some question that you have raised with respect to the meaning of the word "None."

Mr. Battle: Yes, sir.

The Court: I think the jury is entitled to know the circumstances under which that application was signed.

219

Mr. Battle: But Mr. Hughes says that he has no recollection whatever of what happened on the day that Mr. Browder came in there.

The Court: He has no present recollection except as he sees it on the application itself and he says that a certain practice was invariably followed in connection with such application.

Mr. Battle: The question is what the procedure was. The question is not what happened on that particular occasion.

Mr. Werner: Will you read the last question.

220

James Joseph Hughes—For Government—Direct.

(Question read.)

Mr. Battle: If your Honor please, I object to that on the ground first that it is generally incompetent and immaterial and particularly under the circumstances of this case where the charge against the defendant is a written statement. The allegation of falsity is predicated on a written statement, and it would be immaterial as far as this charge is concerned what the defendant might or might not have said. And I object upon the further ground that this witness has testified that he has no recollection whatever about this particular instance.

221

Mr. Werner: Your Honor, Mr. Battle is—

The Court: Objection overruled.

Mr. Battle: I except, your Honor.

Q. (Question reread.) A. I can.

Q. What answer did he give?

Mr. Battle: I renew my objection on each ground.

The Court: I understood that you have an objection and exception to all this line of testimony.

222

Q. What answer did he give, Mr. Hughes? A. "None."

The Court: What is the answer?

The Witness: "None."

The Court: N-o-n-e?

The Witness: N-o-n-e.

Q. And following your invariable procedure, Mr. Hughes, what did you do next?

Mr. Battle: I object, if your Honor please, to that question.

The Court: I understood that you have an objection and exception.

James Joseph Hughes—For Government—Direct.

223

Mr. Battle: I except.

A. The next procedure was to swear him to his signature.

Q. And what do you say to the applicant when you swear him to his signature?

Mr. Battle: All this line of testimony is taken under my exception?

The Court: It is quite understood.

A. I ask him, "Do you swear that this is your signature?"

224

Q. Yes. A. The answer is, "I do."

Q. Anything else said by you? A. Then "Do you swear that the entire contents in this application are true and correct?"

Q. And can you tell by looking at Government's Exhibit 2 in evidence what the applicant answered? A. "I do."

Q. Mr. Hughes, what is the next step in your procedure? A. The next and final step is to administer the oath of allegiance.

Q. And what do you say to the applicant? A. "You also swear your allegiance to the United States?"

225

Q. And can you tell by looking at Government's Exhibit 2 what the applicant answered? A. I can. It is "I do."

Q. What is the next step? A. That is the final step.

Q. What do you do with the application after the applicant has been sworn to it and the identifying witness has been sworn? A. I sign it in two places and put the seal of the United States on it.

Q. Then what do you do with it, sir? A. Then the application is put aside for filing and forwarding to Washington for the issuance of a passport.

226

James Joseph Hughes—For Government—Direct.

Q. I call your attention on the front of Government's Exhibit 2 to the words, "France, England, Germany, Pleasure," and ask you if you know in whose handwriting that is? A. I do.

Q. In whose handwriting is that? A. That was written in by the information clerk from the Wall Street agency.

Q. Who is he? A. Mary J. Hayes.

Q. What are her duties? A. The information clerk?

227

Q. What are the duties of the information clerk? A. To issue instructions to the person who comes before her, as to how to fill the application out, and witness the signature of both the applicant and the witness.

Q. After she has checked it, it comes to you to administer the oath and ask questions? A. To one of the agents of the Department of State.

Q. Can you tell by looking at Exhibit 2 where the applicant requested the passport to be sent? A. The passport was requested to be returned to the New York agency.

Q. Is it a fact, Mr. Hughes, that if the applicant requested it in some cases, the passport is sent to the agency to await his call for it? A. It is.

228

Q. Now I call your attention on the reverse side of Government's Exhibit 2, to the initials "M. J. H.," under the signature "Earl Russell Browder," and to the right of the signature "William Browder," and ask you if you know who wrote that? A. I do.

Q. Who? A. Mary J. Hayes.

Q. And I call your attention to the word "Brother," on the left of the words "William Browder," and ask you if you know who wrote that? A. I do.

Q. Who? A. Mary J. Hayes.

Mr. Werner: That is all.

Mr. Battle: If your Honor please, I renew my objection to each and every question that has been

James Joseph Hughes—For Government—Cross.

asked on the same grounds stated when I made the specific objection.

The Court: Objection overruled. I don't know whether it is necessary to repeat these objections in view of the fact that I have said I have given you not only an objection but an exception. I think that is adequate to cover it.

Mr. Battle: Your Honor's statement that the objection applies to the whole line of testimony and that you give me an exception I think is sufficient.

Cross Examination by Mr. Battle:

Q. Mr. Hughes, back in August, 1934, you were down there at the Sub-Treasury, were you? A. I was.

Q. Were you there in the main room that applicants for passports go into? A. I was.

Q. As I recall that, from my visit there, getting a passport myself, there is a desk, isn't there, on the left hand side? A. There is.

Q. A sort of railing? A. That is right.

Q. And there is a window in the partition there? A. Well, there isn't any partition. You mean at the agent's desk?

Q. Yes. A. No, there is just lights there ahead of him; there is no partition.

Q. Isn't there a partition there with a sort of window behind which the agent sits? A. No, there isn't.

Q. Where did you sit in that room? A. I sat at the first desk on the left of the office as you come in the Wall Street entrance.

Q. As you come in the Wall Street entrance? A. At the left.

Q. At the left? A. That was the first desk on the agent's side.

232

James Joseph Hughes—For Government—Cross.

Q. Was there a partition between your desk and the outside passageway? A. Not the outside passageway. That is where the information clerk sits.

Q. Is there a passage between your desk— A. There is.

Q. And the outside passageway? A. There is.

Q. And when anyone comes in to execute an application, does he see you as he comes in or is that partition between you and the person that comes in the room? A. Ordinarily they wouldn't notice our desk. They go right to the information clerk.

233

Q. They go right to the information clerk. About how many passports do you say you have taken since you have been working there? A. It would be hard to estimate it.

Q. Many thousands, you said? A. A great many thousands.

Q. You say you can't recall the circumstances of any particular case? A. No particular case.

Q. From whom did the applicant get the blank form? A. Usually from the information clerk.

Q. The applicant comes in and gets the application form from the information clerk? A. Yes.

Q. Then the application is filled out? A. Yes.

234

Q. Then does the information clerk and the applicant come to your desk? A. The information clerk doesn't come; the applicant does.

Q. The applicant comes there alone? A. Yes.

Q. So when this application was brought to you it was all filled out just as it is now with the exception of your signature? A. That is right.

Q. You didn't make any notation on it yourself? A. I did not.

Q. I notice on the right hand top of this application—

Mr. Battle: Government's Exhibit 2, is it?

Mr. Cahill: That is right.

Q. (Continuing) Passport number blank, issued at Washington on blank, "seen and had been cancelled." Was that supposed to be filled out when the applicant came in or after the application had been sent down to Washington?

A. Which place is that, please?

Q. Right up here, sir (indicating)? A. That is on every application. If the passport had been issued or had been presented, the record would have been made in that state.

Q. That would have been made down at the office here?

A. It would have been made at my desk.

Q. This signature "Dismon, 9/1" on the face of the application. A. Where is that? Here? 236

Q. Yes, right there. A. That was put on probably in Washington.

Q. That "9/1" means September 1? A. I believe so. That is a Washington notation.

Mr. Battle: I will show it to the jury.

Mr. Cahill: We are going to call men from Washington in the Department of State who know about these things. This man is from New York.

Mr. Battle: I just asked him whether that was there. 237

Q. Was that there when you saw the application? A. It was not there when I saw the application.

Q. Of course this amendment here with the name of "R. B. Shipley" below. That wasn't there, of course? A. No, that wasn't.

Q. What were your hours there? A. From nine until four-thirty.

Q. Now, after the application was made out, was it sent down immediately to Washington? A. The same day.

Q. Then the passport, if the applicant requested it, would be returned and sent to the agency? A. Right.

Q. Or it could be sent to his home? A. Yes.

233

James Joseph Hughes—For Government—Re-direct.

Q. And in this instance there is a request that it go to the agency, is there not? Is this the request, "New York Pouch"? A. That is right.

Mr. Battle: "I request that my passport be mailed to the following address: New York Pouch" type-written across there.

239

Q. And that on this particular application indicates that the applicant requested and desired that the passport be mailed back to your office? A. Right.

Q. And that was done? A. Right.

Q. Mr. Hughes, you have no recollection of this particular passport? A. I have not.

Q. So when you say it was sent back, you mean that was the usual procedure? A. That is the procedure.

Q. Does the applicant usually sign the application before the information clerk? A. That is the usual procedure.

Q. So when the application is brought to you it has already been signed up? A. That is right.

Q. And usually your part of the transaction takes very little time, doesn't it? A. Very little.

240

Q. About how long, would you say? A. In this case probably not more than two minutes; two and a half minutes.

Q. You are still in the Government employ? A. I am, sir.

Q. Up at the Rockefeller Center passport division? A. Yes.

Mr. Battle: That is all.

Re-direct Examination by Mr. Werner:

Q. Mr. Hughes, on Government's Exhibit 2 Mr. Battle read you the passport number blank, issued at Washington blank, "seen and had been cancelled." Is that printed on

James Joseph Hughes—For Government—Re-direct.

241

the form there? A. That is on the form printed by the United States Government Printing Office.

Q. That is not written in, that any passport was seen and cancelled? A. That is right. That is printed by the United States Government Printing Office.

Q. Is there anything filled in on that form? A. No, sir, there is not.

Q. Does that indicate that no passport was seen and cancelled? A. That is right.

Q. You also said that applicants appeared at your desk alone. Does the identifying witness accompany the applicant to your desk? A. Always. 242

Q. "New York Pouch." Will you explain that to his Honor and the jury? A. New York Pouch means that the passport is to be returned to the agency in preference to any other address. It is usually done to expedite the delivery of the passport.

Q. Does the word "Pouch" indicate that it is sent down in a special mail pouch of the State Department and does not go through the regular mail? A. It is a diplomatic government pouch.

Q. Mr. Hughes, you testified that the applicant does not sign his name in front of you. The applicant presents two pictures of himself, does he not? A. The pictures are attached to the application when it comes to the agent's desk. 243

Q. You compare those pictures of the applicant as he looks before you, do you not? A. I do.

Q. And you also ask the applicant to acknowledge his signature? A. I do.

Q. Mr. Battle also asked you whether you could recall the circumstances of each case. Now I ask you, can you state that in each case you follow the procedure which you have testified to here today, and that in other cases there may be things added onto that procedure, but there is never anything taken away from it?

244

James Joseph Hughes—For Government—Re-cross.

Mr. Battle: Your Honor, I think that is leading.
The Court: He has already testified to that.

A. The procedure is always the same.

Re-cross Examination by Mr. Battle:

Q. Mr. Hughes, you are human, aren't you? A. I hope so.

Q. We, all of us, vary in our activities; we don't always do things exactly the same way, do we? A. Not always, I don't suppose.

Q. There is an old proverb that to err is human. A. Right.

Q. You don't claim you did this thing exactly the same way all the time? A. There was very little to do on it. It was mostly done when it came to my desk.

Q. You did very little. Your part was very little. A. Very little.

Mr. Battle: That is all.

246

ELMA V. WALDRON, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Werner:

Q. Mr. Waldron, what is your occupation? A. Agent of the Department of State.

Q. How long have you been an agent of the Department of State? A. About twenty years.

Q. And as agent of the Department of State are you authorized to have applications for passports executed

Elma V. Waldron—For Government—Direct.

247

before you? And to administer oaths in connection therewith? A. Yes.

Q. I show you Government's Exhibit 6 in evidence and ask you if you have ever seen that before? A. Well, my signature appears on here.

Q. On the front page thereof? A. On the front page, yes.

Q. Can you explain to his Honor and the jury what Government's Exhibit 6 is? A. That is an application for renewal of a passport.

Q. In whose name? A. The name of Earl Russell Browder.

248

Q. Now, is there any other writing on that application for renewal in your handwriting besides your signature? A. "N. Y.", meaning renewed at New York. My initials—I merely checked there that I received \$5.00 for the renewal on this page.

Q. On the reverse side is there any writing? A. On the reverse side there is the address of the applicant, what port he is leaving from, New York, by the boat on the French Line. He maintained—the date was February 2, 1937, and at the bottom where it says "Remarks," "Applicant maintains he will travel to France, Switzerland and U. S. S. R. for business for self; occupation Journalist." My signature and a stamp was put on there I believe by me, "This passport not valid for travel in Spain."

249

Q. By looking at that renewal application, Government's Exhibit 6, Mr. Waldron, can you state what conversation you had with the applicant at that time? A. Why, I believe I asked him—

Mr. Battle: I object, if your Honor please, I object to any statement as to the conversation on the ground that the question here is a matter of what was the written statement, and on the further ground—

250

Elma V. Waldron—For Government—Direct.

The Court: The question calls for a yes or no answer.

Mr. Battle: I object to the question.

The Court: Overruled.

Mr. Battle: Exception.

The Witness: May I have the question?

251

Q. By looking at Government's Exhibit 6 before you, can you state what conversation you had with the applicant at the time he appeared with that renewal application?

Mr. Battle: I renew the objection on the ground that the conversation here is immaterial.

The Court: Overruled.

Mr. Werner: I think his Honor ruled that the witness may answer yes or no.

Q. Will you answer yes or no? A. Did I have a conversation with him?

Q. Yes. A. Yes.

Q. Can you state what the conversation was?

252

Mr. Battle: I object to it, if your Honor please on the ground the conversation is immaterial.

The Court: He can answer yes or no. If he can't answer yes or no he can so state.

Mr. Battle: I except.

A. Well, as a general rule we always ask—

Mr. Battle: I object to the statement, what the general rule is, and ask that that question—

Q. By looking at what you have written on that renewal application, Government's Exhibit 6 in evidence, can you state what this applicant told you?

Elma V. Waldron—For Government—Direct.

253

Mr. Battle: I object to that, if your Honor please.

The Court: Overruled.

Mr. Battle: May I just state my ground.

The Court: It is quite apparent what the ground of the objection is.

Mr. Battle: I wish to add one more, and that is this: it is evident from what the witness says that he has no recollection of—

The Court: He hasn't so stated yet.

Mr. Battle: He said that is what we generally do. That is my general rule. I would ask permission to cross examine him on that.

254

Mr. Werner: Your Honor, Mr. Battle won't let me lay a foundation. Now he is objecting because I haven't laid a foundation.

The Court: All right, let us go ahead.

Q. Mr. Waldron, will you examine what you have written on the reverse side of that application, and state whether or not you can tell us whether or not that is what the applicant told you when he appeared with that application, Government's Exhibit 6? A. "7 Highland Place." Place of residence 7 Highland Place. 255

Q. Yes. A. "Yonkers, New York."

Q. Anything else? A. "What port are you leaving from? New York." That is his answer.

Q. Yes. A. "By what boat? French line. When? A. February 1937." February meaning the present year.

Q. Then did you ask him any other questions? A. What countries did he intend to travel to.

Q. Can you tell what he answered from Government's Exhibit 6? A. "France, Switzerland and U. S. S. R. for business for self," that is, meaning for himself. His occupation was journalist.

256

Elma V. Waldron—For Government—Direct.

Q. Now, at the time he presented that renewal application, Mr. Waldron, did he present a passport? A. Yes, sir.

Q. I show you Government's Exhibit 5 in evidence and ask you if that is the passport which he presented for renewal? A. Yes, sir.

Q. And on what do you base that statement? A. On the fact that it appears on the application in my writing.

Q. That is Government's Exhibit 6, the renewal application? A. Yes, sir. The number of the passport and the
257 date it was issued and his name.

Q. Have you finished? A. Yes.

Q. And that checks with Government's Exhibit 5, the passport? A. Correct.

Q. Now, did you affix the stamp "Not valid for travel in Spain" to the passport, Government's Exhibit 5 and the renewal application, Government's Exhibit 6? A. Yes.

Q. Will you tell his Honor and the jury the circumstances of your affixing that stamp? A. At that particular time the passports were not valid for travel in Spain.

Q. And were there instructions of the Department that the agents were not to issue passports valid for travel in Spain without specific instructions to the contrary? A.
258 Yes, sir.

Q. And did you have any specific instructions to the contrary in this case? A. You mean to make it valid for Spain?

Q. Yes. A. No.

Q. Now, I call your attention to a stamp appearing on page 6 of Government's Exhibit 5 in evidence, the passport, reading "Department of State, Passport Agency, New York, No. 4014, renewed February 2, 1937, expires September 1, 1938, by authority of the Secretary of State, Ira F. Hoyt, Passport Department, by Elma Waldron," and ask you if that stamp and the writing on it was put

Elma V. Waldron—For Government—Cross.

there by you at the time the renewal application was made?

A. Yes.

Q. And is the same true for the writing at the bottom of page 7, "See stamp on page 8." A. Yes.

Q. Is the same true with respect to the stamp on page 8, reading "Department of State, Washington, American citizens traveling in disturbed areas of the world are requested to keep in touch with the nearest American diplomatic consular office." A. Yes.

Q. I call your attention to pencil writing on the side of the renewal application, and ask you if that was on the renewal application when you sent it on to Washington? A. No. 260

Q. With respect to renewals of passports, Mr. Waldron, is it necessary for an American citizen to send his passport down to Washington for renewal with an application, or can it be renewed at the local agency? A. It can be renewed at the local agency.

Q. And thereafter you send the renewal application down to Washington? A. The application, yes.

Q. And that is after you have returned the renewed passport to the applicant? A. Yes.

Q. And by looking at Government's Exhibit 6 in evidence, can you state until what date this passport was renewed? A. September 1, 1938. 261

Mr. Werner: Thank you, Mr. Waldron.

Cross Examination by Mr. Battle:

Q. Mr. Waldron, have you any individual recollection about what took place when this petition for renewal was signed? A. Nothing particular, to my mind, to give me any individual knowledge. There are so many—

Q. Where were you working then? A. At the Sub-Treasury Building, Wall Street.

262

Elma V. Waldron—For Government—Cross.

Q. What was your job there? A. Agent of the Department of State.

Q. And did you see a good many applicants? A. Yes, sir.

Q. For passports and for renewals? A. Yes, sir.

Q. Your answers to the questions put to you by Mr. Werner are based on your general custom and procedure, aren't they? A. Correct.

Q. And not on any individual recollection? A. No, sir.

263

The Court: And also from looking at the application itself.

The Witness: ~~Oh~~, yes. That is where I get my knowledge from, the application.

The Court: Your memory has been refreshed to that extent.

The Witness: Yes, sir.

Q. As I understand it, after looking at the application, you still have no individual recollection, have you?

Mr. Cahill: I object ~~to~~ the word "individual" as vague.

264

Q. Any recollection of that particular transaction.

Mr. Cahill: Apart from the paper.

A. Only what the paper shows.

Q. You have no recollection apart from the paper? A. Right.

Mr. Battle: I move to strike out those answers, if your Honor please, on the ground the witness has admitted he has no recollection as to what took place.

Elma V. Waldron—For Government—Cross.

The Court: Overruled.

Mr. Battle: I except. In that connection, if your Honor please, I wish to renew the objections I made to this line of testimony.

The Court: The same ruling.

Mr. Battle: I just want to make that general objection. Exception.

Q. Now, Mr. Waldron, I notice on this petition for renewal that it is dated February 2, 1937. Have you it before you? A. Yes, sir.

266

Mr. Battle: What is the exhibit number?

Mr. Werner: The renewal is 6.

Q. Government's Exhibit 6, and the date of that petition for renewal is February 2, 1937, is it not? A. Yes, sir.

Q. And the original passport was issued according to the notation on this application on September 1, 1934, is that correct? A. That is right.

Q. So that that original passport had expired on September 1, 1936, hadn't it? A. It had, yes.

Q. So that when he came to see you in February, 1937 for a renewal, the original passport had expired? A. Yes, sir.

267

Q. I notice in this Exhibit 6 there are two lines here, "Application and passport submitted for Department's consideration by blank agency on blank" and I notice two check marks across those two lines. A. Yes.

Q. What does that indicate? A. It indicates the passport was not submitted to the Department for consideration.

Q. Nor the application? A. The application was submitted later, after the renewal was made.

268

Elma V. Waldron—For Government—Cross.

Q. But did this indicate that neither the application nor the passport had been submitted at that time? A. Before the renewal was made?

Q. Yes. A. Yes.

Q. And is that the fact, or is that the custom, that the application for passport is usually submitted before the renewal is made? A. No, sir.

269

Q. Well, why is this printed item or application and passport submitted for the Department's consideration? A. If there is any doubt or if there is a protracted foreign residence against a naturalized citizen, the passport is submitted to the Department for consideration. Otherwise we have authorization to renew the passport at our agency.

Q. And in this case the application for passport was not submitted? A. Yes, sir.

Q. It was not submitted at the time of the renewal? A. To Washington, yes.

Q. But not submitted to you? A. The passport was submitted to me—presented to me with the application.

Q. That is, the application for the renewal? A. Yes, the application for the renewal.

270

Q. But the application for the original passport was not submitted to you? A. For the original passport?

Q. Yes. For the passport of September 1, 1934.

Mr. Werner: Do you want to show him the application?

A. I couldn't answer that.

Q. Do you recall whether the application for the passport of September 1, 1934, whether any application for that was submitted for the passport, was submitted to you at the time of the petition for the renewal? A. I would have to see the application.

Q. Here is the application.

Elma V. Waldron—For Government—Re-direct.

271

Mr. Werner: Government's Exhibit 2.

Q. Government's Exhibit 2. A. No, that was not presented at the time the renewal was made.

Q. Now, these lines written through these pen lines, run through these different printed items here. Were they put there by you?

Mr. Cahill: Referring to what exhibit?

Mr. Battle: Exhibit 6.

272

A. Yes.

Q. And that includes the line through the words "Application and passport submitted for the Department's consideration"? A. That is right.

Q. Are you still in the Government service, Mr. Waldron?

A. Yes, sir.

Mr. Battle: That is all.

Re-direct Examination by Mr. Werner:

Q. Mr. Waldron, with respect to your looking at the original application, when the renewal application is presented to you: are those original applications kept in New York or Washington? A. In Washington.

273

Q. You don't ask for them to renew the passport? A. No, sir.

Q. But after you renew the passport you send the renewal application down to Washington? A. Yes, sir.

Mr. Werner: Thank you.

274

Mary Josephine Hayes—For Government—Direct.

MARY JOSEPHINE HAYES, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination, by Mr. Werner:

Q. Miss Hayes, what is your occupation? A. Information clerk of the Passport Agency.

Q. How long have you held that position? A. Since March of 1927.

275

Q. What are your duties as information clerk? A. Well, to meet people when they come in, at least, and they ask questions and want to know just what sort of application to fill out. I ask whether they are native citizens or naturalized citizens; then I determine that and give them a blank to fill out.

Q. Do you give them instructions? A. That is right. They ask questions, they go away and come back and they might be doubtful about something or might not want to fill in the form and they come back and I tell them they have to fill out all the questions.

Q. Different forms are used for native citizens and for naturalized citizens? A. That is right.

276

Q. Miss Hayes, lying on the board in front of you is Government's Exhibit 2 in evidence. I ask you to examine that and state, if you can, whether or not you have ever seen that before?

Mr. Battle: If your Honor please, I object to that on the grounds stated, and particularly on the ground that applies to the previous witness and this witness also, that these documents, both of them have been conceded by the defendant and therefore any further testimony as to them is unnecessary and immaterial.

Mary Josephine Hayes—For Government—Direct.

277

Mr. Werner: Your Honor, the only thing that has been conceded—

The Court: Objection overruled. No argument.

Mr. Battle: Exception.

Q. Miss Hayes, will you look at Government's Exhibit 2 and state, if you can, whether you have ever seen that before? A. Yes, I have seen it before. I recognize my writing on there. I recognize the printing, and my signature on the other side, and the countries to be visited.

Q. Now, by your printing, do you mean the words, "Browder, Earl Russell," on the front page? A. That is right.

278

Q. Now are the words "France, England, Germany, Pleasure" also in your writing? A. That is in my writing. Upon questioning the man he told me where he was going.

Q. In other words, that space was left blank and you asked the man where he was going?

Mr. Battle: I object to that.

The Court: Objection sustained. It is leading.

Q. Was that space left blank when the application was presented to you? A. Yes. That space was left blank, and in some cases I would send them back, but where there would be quite a few in the office and they would lose their place on line, I would question the applicant, where they were going and what the object of their visit was, and to save time, to save their place on line, I would fill it in.

279

Q. That is how you came to fill in these words? A. Yes, that is right.

Q. Will you turn Government's Exhibit 2 over and see whether your initials appear under the signature, "Earl Russell Browder"? A. Yes, they do.

Q. Can you state to his Honor and the jury the circumstances of your putting your initials there?

280

Mary Josephine Hayes—For Government—Direct.

Mr. Battle: I object to that unless she can do so of her own recollection.

The Court: Objection overruled.

281

A. My own recollection is that I had remembered Mr. Browder from reading in the print about his attending hearings down there—of course you know what they are. I know that he is a popular man and about his activity in life. As soon as I seen Mr. Browder I recognized it was Earl Browder from reading the papers about the party he was connected with.

The Court: Then you have a present recollection of him?

The Witness: Yes, I have a present recollection.

The Court: Of the man himself?

The Witness: Of the man that claimed himself to be that name.

282

Q. Did he sign his name in your presence? A. Yes, he did sign his name in my presence. After he signed his name then I witnessed it, and also at the bottom his brother signed his name which at that time I didn't know was his brother. I asked him if it was the same name, what relation there was, connection. He said, "I am his brother."

Q. Did you fill in "Brother"? A. I put in "Brother", that is right.

Q. After that was done, what did you do, Miss Hayes? A. Well, then I attached the other picture onto the application and told him to take it down to the agent to be sworn as to the truth of his testimony.

Mr. Battle: No questions.

(Short recess.)

John O. Bell—For Government—Direct.

283

JOHN O. BELL, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Werner:

Q. Mr. Bell, what is your occupation? A. I am executive assistant to the chief of the Passport Division, State Department.

Q. How long have you been such? A. I have held that position for approximately six months.

Q. Prior to that what was your position? A. Prior to that I was a technical assistant in one of the sections of the Passport Division of the State Department.

284

Q. What are your present duties, Mr. Bell? A. I have administrative supervision subject to the chief's orders, of course, over the work of the Passport Division.

Q. Who is the chief? A. The chief is Mrs. Ruth Shipley.

Q. I take it you are familiar with the operations of the passport division? A. I am.

Q. All phases? A. Correct.

Q. Now, what is the procedure, Mr. Bell, with respect to obtaining a passport? A. A person who desires to obtain a passport must execute an application for such document. The application may be executed before the clerk of any Federal court or before the clerk of a State court having authority to naturalize aliens or before one of the Department's passport agents.

285

Q. Must that application be executed on a form provided by the Department, such as Government's Exhibit 2 in evidence? A. That is correct.

Q. And that form varies, depending on who makes the application, whether it is a naturalized citizen, sometimes? A. That is correct. We have one form for native born citizens, another for naturalized citizens.

Q. When the passport is executed, and by executed I mean when the applicant appears to make application and

286

John O. Bell—For Government—Direct.

sign his name, must he appear in person or can he sign his name and then send the application in? A. No, the applicant must appear in person before the clerk of the court or passport agent.

Q. Must he bring someone with him? A. The applicant must bring in some person who can identify him who has known him for two years or more.

Q. Is there anything else that the applicant must bring with him? A. Yes, the applicant must bring with him two photographs of himself, he must have the statutory fee
287 for a passport, which is \$9.00, and he must also pay the execution fee to the officer who executes his application. He must also bring with him evidence of his citizenship; if he is a native born citizen he would have to bring evidence that he was born in the United States. If he was a naturalized citizen, he would have to bring evidence that he was naturalized as a citizen of the United States.

Q. Why two photographs? A. Two photographs, because one photograph is fastened to and becomes a part of the application itself which is filed in the Department in Washington. The other photograph is affixed to the passport.

Q. Must these photographs be duplicates? A. They must
288 be exact duplicates.

Q. In the event that a naturalized citizen appears, must he bring his naturalization papers with him? A. Yes, he must.

Q. And must he send them to Washington? A. That would depend on where he executed his application. If he executed his application before the clerk of the court, it would be sent to Washington. If he executed his application before the passport agency, it would not necessarily. It might.

Q. If it was not sent to Washington is a notation made on the application concerning whether it was exhibited to the applicant? A. That is correct.

Q. And similarly, is a notation made on the naturalization papers? A. A notation is made on the naturalization papers when the passport is issued.

Q. A stamp is put on the back of it? A. Yes.

Q. In the event that the applicant is a native citizen, Mr. Bell, what proof of citizenship must he supply? A. Well, the department's regulations require that he submit a birth certificate filed on or about the time of birth, or if he can't submit that, a baptismal certificate, or if neither of these documents is available, he must submit affidavits of persons who have personal knowledge of his birth to the effect that he was born here. . . . 290

Q. If a close relative appears with the applicant, is a birth certificate necessary? A. If a close relative appears who has sufficient knowledge to testify to the fact of the applicant's birth, he may submit his affidavit in his application since that affidavit states that the identifying witness knows the facts in the application to be true.

Q. I call your attention to Government's Exhibit 2, which is on the board in front of you, passport application in the name of Earl Russell Browder, and ask you if you can state what procedure was followed in that case? A. This application indicates that Mr. Browder executed his passport application in the passport agency in New York before an agent of the Department, that he was identified by his brother, William Browder, who testified that the facts in the application were true. The application was sent to Washington and there a passport was issued upon it. Do you want to know how the procedure went? 291

Q. Now, I am asking you this question: can you state, Mr. Bell, the procedure of the Department in Washington when the passport application is received? A. Yes. An application comes in and is received from either registered mail or from a locked pouch from one of the agencies in what is known as the cashier's section. In that section the fee is detached from the application and a stamp is at-

292

John O. Bell—For Government—Direct.

tached on the application indicating that the fee has been received. The number is also placed on the application in the lower right hand corner below the stamp I just mentioned, which is called the fee number. That is a number which we use for keeping an accounting record of the operations in the division. Then the application goes from the cashier's office to the passport section of the division of communications and records, where it is given a file reference number, and a certain card record is made of it. Then the application comes from that section back to our division into a section known as the examining section. And in that section there are examiners who are people trained in citizenship or in passport procedure. They look over the application to determine if it conforms with legal requirements and to see that evidence of citizenship has been submitted. If they find that to be the case they approve the application by writing their individual name on the face of the application and below their name the date on which they did so.

293

Q. Is that written in crayon? A. Ordinarily, yes.

294

Q. Before you go any further, I would like to ask you this question: when an application is received, does the Department thereupon look into its files for any and all previous applications made by that individual? A. That is true. At the time it is given a file record number and the card records made, a notation is made upon the application, indicating whether there is any previous record in that particular name.

Q. All right, proceed, Mr. Bell. A. After the examiner has indicated his approval of the application by putting his name and the date upon it, he indicates by a letter at the top of the application the type of the passport to be issued. By the type I mean whether it is to be an ordinary passport or whether it would be a diplomatic passport such as would be issued to a diplomatic officer.

The application is then taken to a desk known as the authorization desk, where a record is made of the fee number, the name of the person applying for the passport, and the number of the passport which will be given. A stamp is placed on the application at that desk indicating that a passport was issued on whatever date it is, and the number is placed at the top of the application, indicating the number of the passport.

The authorization desk is a part of the passport section where the passports are written, and the application is then turned over the person at the next desk, who actually writes the passport. They have a blank book and they write in the passport the names—

Q. By a blank book, do you mean a book like Government's Exhibit 5? A. Yes. It is just like this. It has a number printed on the top. That is the number of the passport. Inside it leaves blank the name of the bearer and his personal description, whether he is accompanied by wife, and so forth. The writer of the passport takes the information from the application and transcribes it onto the passport—the name, whether he is accompanied by wife, the date on which the passport is written, the personal description of the applicant, his height, the color of his hair, the color of his eyes, the date of birth, his occupation. This passport is then turned over with the application to a boy in the mailing section and in that section he takes the photograph that is with the application and fastens it with glue into the passport and then he puts through a machine the seal of the Department on the photograph and also on this red wafer. He also impresses the legend which says "Photograph attached, Department of State, Washington" in the passport. Then the passport is ready to be mailed. It is then placed in an envelope which is given the address that the applicant requests that the same be mailed, and it is sent out by registered

298

John O. Bell—For Government—Direct.

mail, or perhaps sent to one of the passport agencies if the applicant requests that action to be taken.

Q. What is the procedure, Mr. Bell, with respect to renewal of applications? A. The renewal applications follow a similar procedure in that an application comes in, is given a renewal fee number and the fee stamp placed upon it. It goes to the record section for clearance and the card record has to be made, and it comes to an examiner and the examiner examines the application for renewal, indicates his approval of it by placing his name on it in the same fashion.

299

Now, there comes a difference in the procedure in that it goes to a different clerk and the renewal is placed in the passport by hand. That is, there is a rubber stamp which we have, a blank rubber stamp, which is stamped in the passport and a renewal number that appears on the top of the renewal application is written in that blank space, the date of the renewal is written in by hand and the date of the expiration. It is signed by some person authorized to do so and the seal of the Department is placed on the stamp and it is mailed out in the same fashion.

300

Q. And that renewal may be done at the local agency? A. The passport may be renewed either in the Department, sent in by the individual or the individual may appear at a passport agency and have the renewal occur there. It can be renewed by one of our passport agents as well as in the Department.

Q. Mr. Bell, can you explain to his Honor and the jury just what all notations on Government's Exhibit 2 indicate? A. I think I can.

Q. Before you start, Mr. Battle has kindly lent me the photostatic copies. Perhaps the jury can follow you better with those before them. (Handing to jury.)

Now, will you explain the notations, Mr. Bell, beginning at the upper right hand corner and indicating just where

John O. Bell—For Government—Direct.

301

on the application the notations appear? A. Well, you will see in the immediate upper right hand corner the number 145182. That is the number of the passport. That is the same number that is printed in the passport itself. Immediately below that number you will see a stamp which says, "Passport issued September 1, 1934, Department of State." That is the stamp placed on at the same time that the number of the passport is placed on there, indicating that on that particular date a passport was actually issued at Washington.

—In the left hand upper corner there is a penciled initial which indicates that a clerk checked the writing of the passport against the information in the application to make sure that the passport was correctly written. The large red crayon name and date in the application is the name of the examiner who approved it, indicating that the issuance of the passport was approved on that particular date.

302

Q. You mean the word "Dismon 9/1"? A. That is right. There is also a stamp right next to Miss Dismon's name, which says, "Relative as witness attests to applicant's citizenship." That is the stamp placed on the application in the passport agency when the application was sent to Washington, calling attention to the fact that instead of submitting a birth certificate the applicant had established his citizenship through the testimony of his brother.

303

There is a stamp immediately below that which says "Filed September 6, 1934." That is the stamp indicating that after the passport was issued, the application was placed in the files of the Department on that date.

There is a stamp in the lower right hand corner that says, "Passport fee received September 1, 1934." That is the stamp I spoke of before placed on the application in the cashier's office; indicating that the sum of \$9.00 had been turned into the Department.

Below that is the number 17168, which is the fee number, an accounting record number. The initials in the lower

304

John Q. Bell—For Government—Direct.

left hand corner, "C"—I can't read that. It looks like "REC". There is a notation made in the record section, indicating that the files had been searched.

305

Q. What does that indicate, that there were previous passport applications in the name of Earl Russell Browder made by the individual who made the passport in the name of Earl Russell Browder? A. The "C" is a symbol which we use for the word "cleared." By the word cleared, we mean that the files of the Department had been searched and that no record of any passport application or of any renewal application in that same name as appearing on this application has been found.

Q. And your files work by name only? A. That is correct. Now, as regards the other notations in the application—

Mr. Battle: Will you ask him about the notation in the middle?

Mr. Werner: Yes, we will come to that in a minute, Mr. Battle.

306

Q. Mr. Bell, with respect to the notation in the middle of the application, we will pass that for the moment because that was made at a later date, was it not? A. Yes, it was.

Q. Will you explain the notation on the second page of the application? A. On the second page of the application, immediately below the signature of the applicant, you will see the initials "M. J. H." Those are the initials of Miss Hayes, a clerk in the passport agency at New York, and they indicate that Mr. Browder signed his name to the application in her presence.

Down in about the center of the page you will see two stamped impressions each saying, "New York Pouch." That is a stamp placed on the application in the New York passport agency, which indicates that the applicant requested that instead of sending the passport to him by

John O. Bell—For Government—Direct.

307

mail, it be delivered to the New York agency, where he could appear and obtain it.

Q. Just a moment, Mr. Bell. I show you Government's Exhibit 8 for identification and ask you if that is a record that the passport which was issued on the application, Government's Exhibit 2, was sent to the New York agency by the New York Pouch? A. Yes, it is.

Q. That is a record kept in the regular course of business by the passport division? A. Yes, we keep such a record every day.

Q. And when does that record indicate that the passport was sent? A. It indicates that on the evening of September 1st, 1934, the passport bearing number 145182 issued in the name of Earl Russell Browder was sent by locked pouch to the New York passport agency.

308

Q. Will you examine Government's Exhibit 5 in evidence and state if you can, whether that is the passport referred to? A. This is the passport issued upon the application known as Government's Exhibit 2.

Q. And referred to in the mailing, Government's Exhibit 8 for identification? A. Yes.

Mr. Werner: I offer Government's Exhibit 8 for identification in evidence. 309

(Government's Exhibit 8 for identification received in evidence.)

Q. Will you proceed, Mr. Bell? A. About the notations?

Q. Yes, sir. A. Immediately opposite the stamp I spoke about which says, "New York Pouch" you see the initials in blue erayon which are the initials of the individual who actually wrote the passport, that is, who typed on the machine and placed the name of the bearer in this passport. There are also the initials "M. J. H." opposite the name of the identifying witness; that has the same significance

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310

John O. Bell—For Government—Direct.

as it had above, to-wit, that the identifying witness in this application signed his name in Miss Hayes's presence.

I don't know if there are any other notations on here that you want to know about.

Q. Are there any other notations? A. Well, there are some blue crayon crossmarks.

Q. Who were those put in by? A. They were put on by a clerk to indicate that that part of the application was not pertinent.

311

Q. I show you Government's Exhibit 6 in evidence, a renewal application in the name of Earl Russell Browder, and ask you if you can tell from that whether a passport, Government's Exhibit 5, was renewed? A. This application indicates that the passport issued on this application—that passport (indicating).

312

Q. You mean Government's Exhibit 5? A. Government's Exhibit 5. The reason I know that is because the number of that passport appears on here as well as the date of its issue and the name under which it was issued. This indicates that the passport was renewed in the New York passport agency on February 2, 1937, to be valid until two years from its original date of expiration, that is, until September 1, 1938. The passport is good for two years and can be renewed for two years more upon the payment of a fee of \$5.00.

Q. Will you explain the other notations appearing on Government's Exhibit 6? A. Yes. There is the notation immediately in the center of the application, the name "Owens", and the date "2/11/37" which is the name of the examiner who checked the action of the New York passport agency for correction and indicating his approval of that action by placing his name on that particular date.

There is a stamp in the immediate top center which says "File" and the letters "PD" and then above, superimposed upon that the penciled initials "RW". That is an initial made by a clerk at the authorization desk in the depart-

John O. Bell—For Government—Direct.

313

ment indicating that she had made a record of this renewal and the fee having been paid and sent it to file. There is a notation and stamp in the lower right hand corner indicating that the renewal fee was received in the department, and there is a number below that, indicating it was given that particular number.

Q. Now I call your attention to the writing on the side,

"130—Appl 9/1/34 See 130—Johnson Richard Corres 6/ 8/36
130—Berger, Harry " 4/15/36
130—Browder, Earl Refs (4)"

314

and ask you what those notations are? A. Those notations are made in the record section, just indicating that there are other files to which a cross reference is made.

Mr. Battle: Will you read that answer, please.
(Answer read.)

Q. Now, Mr. Bell, I call your attention to Government's Exhibit 2 again, the original passport application in the name of Earl Russell Browder, and call your attention to the large stamp in the center of the page. Mr. Battle asked what that was and I said we would come to it. Will you explain that? A. In order to explain that properly I think it might be well to refer to this exhibit. 315

Q. All right, will you do that. Government's Exhibit 6. A. Yes, sir. Because on the back of this renewal application there is a stamp which reads, "This passport not valid for travel in Spain." The presence of this stamp on this application indicates that that stamp was also placed in the passport at the time it was renewed. The reason for the placing of that stamp was because passports were not being issued for travel in Spain in ordinary circumstances. That stamp can be found in the passport.

Q. Government's Exhibit 5? A. Yes; Government's Exhibit 5, is it? Five, yes. The stamp can be found on the

316

John O. Bell—For Government—Direct.

passport in page 8, no, on page 5. That is where I looked for it first and I couldn't see it for the entry stamps. This stamp appears right here, "This passport not valid for travel in Spain." As I say, we were restricting passports for Spain. We were not issuing them to any individual wanting to go there, and any person who got a passport was automatically given that stamp in his passport.

Q. That was during the period of, shall we say, unrest in Spain? A. Yes.

317

Q. Thereafter did the division receive a letter, Government's Exhibit 7 in evidence, with respect to the right of the user of the passport to travel in Spain? A. Yes, Government's Exhibit 7 is a letter addressed to the chief of the passport division, requesting that Mr. Browder's passport be made valid for travel in Spain, as a correspondent for the "Daily Worker."

Q. Did you receive that? A. It was received in our Department.

Mr. Werner: Your Honor, may I read this letter to the jury?

The Court: Is it marked in evidence?

318

Mr. Werner: Yes, your Honor.

(Government's Exhibit 7 read to the jury.)

Q. Now, will you tell his Honor and the jury just what procedure was followed after the receipt of that letter. A. The letter having been received, the case was inspected and, as it was a practice of the Department to make passports valid for travel in Spain for news correspondents, when their status as such had been established, a notation was made upon this letter, which reads, "Amended to be valid for Spain; news correspondent," and the name of the individual who directed that action in our division. The passport was then amended, that is, the word we use for calling this procedure, and a stamp was placed in the pass-

port, the same stamp was placed on the letter and the same stamp was placed on the original application for that passport.

Q. Is that the large square stamp which you previously referred to? A. That is correct. The stamp says, "Department of State. Amended." In the stamp, in all three places, appear the words, "The bearer is a newspaper correspondent assigned to Spain and his passport is valid for travel in that country." That was an action taken, as indicated by the date appearing in the stamp, November 26, 1937.

Q. Do you know in whose handwriting that is? A. The handwriting in the stamps?

Q. Yes? Do you know? A. Well, in the passport itself, the amendment is written on a machine and the only handwriting which appears is the signature of the Chief of Division, above her title.

Q. That is Mrs. Shipley? A. That is correct.

Q. Mr. Battle inquired of a previous witness who wrote, "The bearer is a newspaper correspondent," et cetera, inside the square on the passport application. Do you recognize that handwriting? A. Yes, that is the handwriting of one of the employees of the Division. Her name is Mrs. Lindsay, but she wrote that in there—we had it pretty well set, the sort of language we would use in these cases, and when the person who approved the application indicated that it was to be amended for travel in Spain as a news correspondent, she knew what language was to be used and she wrote that in there and then typed it on the machine in the passport.

Q. What is the procedure of the Department with respect to all passports which have expired or another passport presently issued to the same individual who is making a new application? Must that passport be shown to the Department at the time the new application is made? A.

322

John O. Bell—For Government—Cross.

The regulations require that the person applying for a passport submit for cancelation his previous passport.

Q. May a person have two valid outstanding passports at the same time? A. No.

Q. One in one name and another in another name? A. No, he may not. He may not even have two valid passports in his own name at the same time.

Q. Where did you first see that passport, Exhibit No. 5, Mr. Bell? A. Well, the first time that I can be positive I saw it was in September, 1938.

323

Q. In whose possession was it? A. At the time I saw it, Mr. Browder gave it to Mrs. Shipley.

Mr. Werner: You may cross-examine.

Cross Examination by Mr. Battle:

Q. What was the occasion of giving it to Mrs. Shipley in September, 1938? A. He called at the Department to see her and turned the passport over to her.

Q. On what occasion was he seeing her, do you know?

324

Mr. Werner: If you know, Mr. Bell, of your own knowledge.

A. It was in September, 1938, that he called. Now, he called to see Mrs. Shipley and went into her office and I was in the office immediately outside, and she called me in at the time Mr. Browder gave her the passport and handed the passport to me and I took the passport out. That is the extent of my knowledge.

Q. What was his object in surrendering that passport?

Mr. Werner: Your Honor, I submit Mr. Bell is not a mind reader.

Mr. Battle: You asked him the same question.

John O. Bell—For Government—Cross.

325

The Court: It raises the same question we discussed before. I think there has been enough here to show it is pretty well indicated that in September, 1938, Mr. Browder made an application for another passport and he surrendered this one at that time. Is that enough?

Mr. Battle: Yes, sir, that is quite enough, your Honor.

Q. Mr. Bell, did you have anything to do personally with the application that Mr. Browder filed in August, 1934? A. Nothing to do with it personally.

326

Q. Your testimony here has just been given from the general knowledge of procedure of the Department? A. Yes, I am quite familiar with that procedure.

Q. I say, it is not given from any personal knowledge as to what Mr. Browder did or did not do in connection with the 1934 passport? A. That is correct.

Mr. Battle: Will your Honor pardon me just a moment?

Q. What was your statement, Mr. Bell, in regard to these annotations on the side of the application for renewal?

327

Mr. Battle: May I submit to the jury copies of the renewal, which is already in evidence?

The Court: You haven't an extra copy of that for me?

Mr. Werner: I am sorry, your Honor, I apologize. (Mr. Battle hands the same to the jurors individually.)

Q. What did you say, Mr. Bell, were these notations here on the lefthand margin of the petition for renewal? A. I said I believed that those were notations made in the record section indicating cross references to other files.

328

John O. Bell—For Government—Cross.

Q. Indicating cross references to other files? A. Yes.

Q. That is, files containing applications for passports?
A. Well, they might or might not contain applications for passports. They were files containing applications for passports or correspondence regarding passports. The letters, 130, indicate that particular classification.

Q. That is, the letters 130 indicate passports issued to native born citizens, don't they? A. No, they do not.

329

Q. What do they indicate? A. They indicate that there has been some correspondence or perhaps an application for some person striving to obtain a passport. There are many hundreds of files in that number that are not citizens.

Q. I understood the testimony of the gentleman in charge of the records to be that 130 indicated an application made by a person claiming to be a citizen. A. That is correct.

Q. And you agree? A. And it also includes correspondence regarding the passports.

330

Q. So that notation means that there was correspondence concerning this application and that that correspondence appears in these two files? A. It does not indicate that there has been correspondence regarding Mr. Browder's application necessarily. I haven't the files here. I do not know what you would find if you would look in those files. That indicates that there is a reference made in that particular file which should be looked at in connection with this case.

Q. When was this notation made on it, Mr. Bell? A. That was made at the time the application was received in the Department, and that would be on or about the 5th of February, on that.

Q. Do you know in whose handwriting it is? A. I could not identify the handwriting. I know where it was made but what individual wrote it, I could not say.

Q. You made some statement, Mr. Bell, about Mrs. Shipley's handwriting appearing on the passport. A. Yes.

Q. Just where does that appear? A. Page 6.

John O. Bell—For Government—Cross.

331

Mr. Werner: That is page 6 of Government's Exhibit 5?

The Witness: Yes.

Q. Page 6 of the passport, Government's Exhibit 5. And that notation reads as follows, "November 26, 1937. This passport is amended to read, the bearer of this passport is a newspaper correspondent duly assigned to Spain and his passport is therefore valid for travel in that country. R. B. Shipley, Chief of Passport Division." That is the same notation or stamp that appears on the face of the application, isn't it? A. Yes.

332

Q. And that is Mrs. Shipley's handwriting? A. Yes, it is.

Q. So that application to amend the passport was made to Mrs. Shipley? A. Oh, no, except as chief. It is a practice—was Mrs. Shipley's practice to personally sign any amendment making a passport valid for travel in Spain. All other amendments are signed for—as you will note here, in the form of the regular stamp, it says, "R. B. Shipley, Chief of Passport Division by," and there are one or two individuals authorized to put their names in that space, indicating that they are acting under her authority.

333

Q. But this particular amendment here was signed by her personally, wasn't it? A. Yes. All amendments for travel in Spain were signed by her, and that was one of them.

Q. You know her handwriting? A. Yes, I do.

Q. And that is her personal handwriting? A. Yes.

Mr. Battle: That is all. Thank you.

Mr. Werner: Your Honor, may I recall Mr. BEN at a later time for further testimony?

The Court: Yes.

Mr. Battle: What is it?

334

Loftus Murray—For Government—Direct.

Mr. Werner: I should like permission to recall Mr. Bell, and there are several witnesses, from time to time, I should like to recall as their testimony is necessary.

Mr. Battle: Mr. Bell is to remain here?

Mr. Werner: Yes.

Mr. Battle: Very good.

335

LOFTUS MURRAY, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Werner:

Q. What is your occupation, Mr. Murray? A. I am a clerk at Ellis Island in the Record Division.

Q. What do you do? A. Well, among other things, I search manifests in connection with naturalization matters and immigration matters.

Q. When a ship arrives at the Port of New York, Mr. Murray, must an officer of that ship or the steamship line submit a manifest including the names of every passenger and member of the crew? A. Yes.

336

Q. And those records are kept in your Department? A. That is right.

Q. Are any records kept with respect to the entry of naturalized citizens or native citizens with the exception of the ship's manifests? A. There are no other records kept.

Q. So that if I should give you the name of a native or a naturalized citizen and ask you if and when he arrived at the Port of New York on any occasion, you could not find that individual's entry unless you were given either the ship or the date? A. I would have to have the ship or the exact date and the port of departure.

Loftus Murray—For Government—Direct.

337

Q. And if you did not have that, through approximately how many names would you have to search? A. Several millions. We have names from 1897 of all aliens arriving in this country to the present time.

Q. For native citizens you have only the manifests? A. That is all.

Q. Have you produced here the manifest of the Steamship Berengaria, arriving at New York on April 30, 1937?

A. Yes.

Q. And the manifest of the Steamship Aquitania arriving at New York on February 15, 1938? A. I have that.

338

Mr. Werner: I ask to have these marked for identification, please.

(Berengaria manifest marked Government's Exhibit 9 for identification; Aquitania manifest marked Government's Exhibit 10 for identification.)

Q. Does Government's Exhibit 9 for identification reflect the arrival of Earl Russell Browder at the port of New York—

Mr. Battle: I object to stating what it shows unless it is offered in evidence. It is only marked for identification as yet.

339

Q. Is that a record kept in the regular course of business? A. This is the original manifest kept at Ellis Island.

Mr. Werner: I offer it in evidence.

Mr. Battle: Let me look at it, please.

Q. And the same is true of Government's Exhibit 10 for identification? A. Yes.

Q. It is the original manifest? A. Yes.

340

Loftus Murray—For Government—Direct.

Mr. Werner: I offer that in evidence.

Mr. Battle: Will your Honor give me just a moment to look at these?

The Court: Certainly.

Mr. Battle: No objection.

(Government's Exhibit 9 for identification received in evidence.)

Mr. Battle: What are you marking in evidence, how much of that?

Mr. Werner: The manifest.

341

Mr. Battle: That sheet, you mean, that whole sheet?

Mr. Werner: The whole page constitutes the complete manifest—

Mr. Battle: The whole page?

Mr. Werner: The whole book constitutes the complete arrival. I am offering the whole book in evidence.

The Court: I think a page might be sufficient, or a portion there.

Mr. Werner: The point is, the page—

The Court: Apparently it is, I am satisfied.

342

Mr. Battle: What is the whole thing? Are these the arrivals of passengers?

The Court: I am sorry I made the point.

Mr. Battle: I see no reason for putting in anything except this particular page or this particular entry.

Mr. Werner: Well, the particular page does not show the certification by the captain and the surgeon, which is corroborative of the page. That is the sole reason.

Mr. Battle: Where is that?

Mr. Werner: Here (indicating).

The Court: Why can't it all be marked and then we will allow Mr. Battle to pick out such portions

Loftus Murray—For Government—Cross.

as he thinks are pertinent to this inquiry, and the rest of it will be considered completely out.

Mr. Werner: That is it.

Mr. Battle: That is satisfactory.

Mr. Werner: I offer Government's Exhibit 10 for identification in evidence

(Government's Exhibit 10 for identification received in evidence.)

Q. Mr. Murray, by examining Government's Exhibit 9 in evidence, can you state whether one named Earl Browder, giving his birth place as Wichita, Kansas, 20th May, 1891, and his address in the United States as 35 East 12th Street, New York, N. Y., arrived at the port of New York on the S. S. Berengaria, sailing from Cherbourg, April 24, 1937, and arriving April 30, 1937? A. Yes, the manifest shows that.

Q. From Government's Exhibit 10 in evidence can you say whether an individual named Earl Browder, allegedly born at Wichita, Kansas, May 20, 1891, giving his address as 7 Highland Place, Yonkers, N. Y., arrived on the S. S. Aquitania, sailing from Cherbourg, February 9, and arriving at New York, February 15? A. Yes, that is so.

Mr. Werner: You may cross-examine.

Cross Examination by Mr. Battle:

Q. Mr. Murray, all that you can testify about is that these are the manifests that you produce from your records? A. Yes.

Q. You do not know personally anything about the landing of Mr. Browder? A. No.

Mr. Battle: That is all.

346

Jacob Levy—For Government—Direct.

JACOB LEVY, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Werner:

Q. Mr. Levy, what is your occupation? A. I am a customs clerk employed in the office of the Collector of Customs in New York.

Q. Has the office of the Collector of Customs jurisdiction of and supervision of records relating to customs declarations made by people arriving at the port of New York?

347

A. They do.

Mr. Werner: I will ask to have these marked for identification.

(Marked Government's Exhibits 11 and 12 for identification.)

A. Are Government's Exhibit 11 for identification and 12 for identification customs declarations in your files?

A. That is correct.

Q. Mr. Levy, are your files kept alphabetically, or, to find a customs declaration of an individual, must you know the boat and time on which that individual entered the port of New York? A. It is necessary to know the name of the boat and the time of entry to get baggage declarations.

348

Mr. Werner: You may cross-examine.

Mr. Battle: Are you going to offer them?

Mr. Werner: If you have no objection, I will put them in now.

Mr. Battle: I will examine them later.

Mr. Werner: Do you object?

Mr. Battle: I cannot tell you. I want to look them over first.

Jacob Levy—For Government—Direct.

Mr. Werner: I offer Government's Exhibits 11 for identification and 12 for identification in evidence.

Mr. Battle: Let me look at them, please.

(Mr. Werner hands same to counsel.)

Mr. Battle: We have no objection.

(Government's Exhibits 11 and 12 for identification, received in evidence.)

Mr. Werner: Do you wish to cross-examine?

Mr. Battle: No, no questions.

Mr. Werner: Government's Exhibit 11 in evidence is a baggage declaration entry in the name of Earl Browder. Government's Exhibit 12 in evidence likewise is a baggage declaration entry in the name of Earl Browder. Each shows an entry on a given date at the port of New York. You gentlemen may desire to examine them.

350

The Court: We will take a recess until quarter past two.

Mr. Battle: What hour did your Honor adjourn to?

The Court: Two-fifteen. Have you any suggestion as to whether we have a longer adjournment?

Mr. Battle: Will your Honor make it two-thirty? 351

The Court: That will be up to the jury.

Mr. Battle: The jury has no objection to making it two-thirty?

The Court: All those in favor of two-thirty will raise their right hand. Two-thirty.

(Recess until 2:30 p. m.)

(Afternoon session.)

Mr. Battle: If your Honor please, there are two exhibits just marked in evidence just before the recess, two customs declarations, Government's Ex-

352

Knute B. Larson—For Government—Direct.

hibits 11 and 12. I should like to read them to the jury before proceeding.

The Court: All right.

(Mr. Battle read from Government's Exhibit 11 and 12 to the jury.)

KNUTE B. LARSON, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

353 Direct Examination by Mr. Dunigan:

Q. Mr. Larson, what is your occupation? A. Inspector of immigration.

Q. At the port of New York? A. Correct.

Q. And how long have you been an inspector in the immigration service? A. Since 1924.

Q. Will you explain briefly to the Court and jury the duties of an immigration inspector such as yourself. A. I board a cutter at the Battery, proceed down to the ship, meet the ship anywhere between Quarantine and the pier, board the ship and examine with my colleagues all the passengers and members aboard the ship.

354 Q. You say that you board a cutter and meet the ship down the bay? A. Correct.

Q. Can you tell us whether or not you are one of the first to board an incoming ship? A. The doctor at the present time is the first person to board the ship to find out about the health conditions aboard the ship. After that the customs and the immigration board the ship immediately.

Q. So that, Mr. Larson, when you board the vessel all of the persons on board that vessel must have been on at the last port that the vessel touched, is that true? A. That is correct.

Q. I show you a manifest that is marked Government's Exhibit 9 in evidence of the SS. Berengaria, and ask

Knute B. Larson—For Government—Direct.

355

you to examine it and state if you see on the particular sheet before you the name of a passenger by the name of Earl Russell Browder? A. I do.

Q. What was your answer? A. I do. I see his name right here (indicating).

Q. Now, I direct your attention to the signature appearing at the bottom of the page and ask you if you recognize that signature? A. That is my signature, correct.

Q. Can you tell from examining the date of the arrival of the SS. Berengaria? A. I can.

Q. And would you tell us the date, please? A. April 30, 1937. 356

Q. Now, by looking at that particular page, Mr. Larson, and directing your attention again to your signature, are you able to state if you checked off the names that appear on that page? A. Yes, I can state that because otherwise my signature would not appear at the bottom of the page and I would not sign my name unless each and every passenger on this manifest would have been checked off.

Q. I show you Government's Exhibit 5 in evidence, Mr. Larson, a passport in the name of Earl Russell Browder. A. That is correct.

Q. And direct your attention to the stamp appearing on this page here reading, "Immigration and naturalization Service, Department of Labor, Arrived April 30, 1937." A. That stamp was placed there by me. 357

Q. You say that you placed that stamp on the passport yourself? A. I did.

Mr. Battle: I object to this on the ground that has been raised before, that this use or so-called use of the passport is not a use which is contemplated by the statute or within the prohibition of the statute.

The Court: Overruled.

Mr. Battle: Exception.

358

Knute B. Larson—For Government—Direct.

359

Q. Mr. Larson, would you tell us the procedure that you employ in checking off names on the manifest in connection with passports? A. Yes. Each and every passenger is issued a landing card by the purser of the ship. This landing card has a number of the manifest. In this particular case that would be number 6. That is the first number on the landing card. The second number on that landing card would be the line number, which in this case happens to be 2. So the landing card would be Manifest No. 6 and Line No. 2. That is so as to make it easier for us to find the name on the manifest right away. And the passenger has to present the documentary proof that he is the person alleged to be on that manifest, and he presents that landing card and whatever evidence he has of his citizenship, as in this particular case he is a United States citizen. If he has a passport we stamp the passport and the landing card, which gives him permission to go ashore.

Q. As you check off the names on the manifest; is that correct? A. That is correct.

360

Q. When the passport is presented to you, Mr. Larson, do you examine it in any way in connection with the individual who presented it to you? A. We naturally compare the picture with the person that applies for admission. We also look at the place of his birth if he was born here, and if he was a naturalized citizen we would ask him where he was naturalized, and so forth, to satisfy ourselves that he really is a United States citizen.

Q. And the picture appearing on the passport is a likeness of the individual who presented that passport? A. That is correct.

Q. Mr. Larson, when a person comes into the port of New York from a foreign port he must demonstrate to you his right to enter the United States, isn't that so? A. Positively.

Knute B. Larson—For Government—Cross.

361

Q. And that is true of native born American citizens as well as others? A. Yes.

Mr. Battle: I object to that, if your Honor please. This is calling for a conclusion of law. I object to it as incompetent, and immaterial. It is a conclusion.

The Court: I will sustain that objection.

Q. Is a passport, Mr. Larson, one of the methods used by individuals to demonstrate their right to enter this country? A. Yes, that is true. 362.

Mr. Battle: I object to the last part of it. I object to the conclusion.

The Court: Overruled.

Mr. Battle: And calling for an answer which is really a question of law.

The Court: Overruled.

Mr. Battle: Exception.

Q. What was your answer, Mr. Larson? A. That is true, I said.

Q. And a passport was used by Earl Russell Browder in this particular case? A. Yes. 363

Mr. Dunigan: That is all, Mr. Larson. Thank you.

Cross Examination by Mr. Battle:

Q. You are in the Immigration Department, are you not, Mr. Larson? A. Yes, Counselor.

Q. And that Department deals with aliens? A. That is correct.

Q. And only with aliens? A. What is that?

364

Knute B. Larson—For Government—Cross.

Q. And only with aliens? A. Well, as far as immigration laws are concerned, but we must also check off all American citizens to ascertain whether they are American citizens or not.

Q. And if they are citizens then you have no further jurisdiction over them? A. Not if we are satisfied they are citizens.

Q. So when a man lands and if he has any evidence that satisfies the inspector that he is an American citizen, then the inspector is through with him? A. That is true.

365

Q. He can land or not, just as he feels? A. But he must produce some evidence.

Q. But after he satisfies the immigration inspector that he is an American citizen he can land or not, just as he feels? A. Yes.

Q. You said if he had a passport or any other evidence to show he was a citizen he would exhibit it to the immigration inspector? A. That is right.

Q. What other kind of evidence would there be? A. He may carry a birth certificate, naturalization certificate, anything of that kind. Anything to satisfy the inspector that he really is an American citizen and entitled to be landed as such.

366

Q. Anything of that kind to show that he is a citizen is presented to the inspector? A. I wouldn't say anything, Counselor; any satisfactory proof.

Q. Anything that is satisfactory proof to the inspector? A. That is true.

Q. And a birth certificate in many instances would be satisfactory proof? A. Yes, that would satisfy me.

Q. And a naturalization certificate? A. Yes, if the person should prove he was the rightful owner of that birth certificate or naturalization certificate.

Q. And a passport would be the same kind of evidence? A. Yes.

Mr. Battle: That is all.

Mr. Dunigan: That is all.

Louis Schneittacher—For Government—Direct.

367

LOUIS SCHNEITTACHER, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Dunigan:

Q. Mr. Schneittacher, what is your occupation? A. Inspector of customs.

Q. And how long have you been a customs inspector? A. About 30 years.

Q. I show you this paper—it is marked Government's Exhibit 11 in evidence,—and ask you if you have seen that paper before? A. Yes, I have.

368

Q. Will you tell the Court and the jury what it is. A. It is a customs declaration, a declaration of any passenger arriving from Europe or any foreign port.

Q. Can you tell from the declaration itself the name of the passenger? A. Yes.

Q. What is the name? A. Earl Browder.

Q. Can you tell from examining the customs declaration the date of the arrival of the passenger? A. Yes, April 30, 1937.

Q. On what boat? A. The Berengaria.

369

Q. Will you tell us, Mr. Schneittacher, the procedure that you followed in examining incoming passengers' baggage. A. Well, we receive the declaration from the staff desk which is presented to us by the staff officer after the passenger hands in his coupon which has a number that corresponds to the passport number and when we receive the declaration we ask if all his baggage has been declared. That is the first question. Then we ask if this contains everything they purchased or obtained abroad and then we ask him to acknowledge the signature.

Q. What is the signature appearing on that particular declaration? A. Earl Browder.

Q. And you asked him if that was his signature? A. Yes, sir.

370

George S. German—For Government—Direct.

Q. Can you tell from looking at the paper itself what he said in answer to that question? A. Well, he acknowledged his signature.

Q. I direct your attention, Mr. Schneittacher, to the writing in parenthesis "for. Lang." Can you tell us whose handwriting that is? A. That is my handwriting.

371

Q. Would you explain to the Court and jury what that writing means. A. That means that he has an item here of a collection of books for \$50, foreign language books. Books in a foreign language are free of duty, and I made a notation alongside of it which indicates that those books are in a foreign language. "For. lang." means foreign language according to my notes.

Q. Mr. Schneittacher, approximately how many passengers' baggage do you examine in the course of a year? A. Well, that is pretty hard to say.

Q. A great number? A. Oh, very many.

Q. Do you have any independent recollection of this particular examination other than the paper itself? A. No, I can't recall anything particularly about this declaration.

372

Mr. Dunigan: That is all.

Mr. Battle: No cross-examination.

Mr. Dunigan: Mr. German.

GEORGE S. GERMAN, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Dunigan:

Q. Mr. German, what is your occupation? A. Immigrant inspector.

Q. How long have you been an immigrant inspector? A. Since January, 1930.

George S. German—For Government—Direct.

373

Q. Would you explain to the Court and jury the duties of an immigrant inspector, briefly. A. It is the examination, or my part of it consists of the examination of persons seeking to enter the United States to determine whether or not they are citizens, and if they are aliens, to determine their admissibility.

Q. You mean by that that you meet incoming passenger ships? A. I do, sir.

Q. Where do you first board an incoming passenger vessel, Mr. German? A. Usually in the Narrows, off Quarantine, and sometimes beyond that at Gravesend Bay.

374

Q. Are you among the first group that boards the vessel? A. We are the first group to board the vessel, sir.

Q. I show you a manifest of the SS. Aquitania. It is marked Government's Exhibit 10 in evidence; and I direct your attention to this particular page and ask you to examine it and state if you find the name of Earl Russell Browder or Earl Browder appearing on that page? A. Such a name is on line 1.

Q. Can you tell from examining the manifest the date of arrival of the SS. Aquitania? A. On February 15, 1938.

Q. At the port of New York? A. At New York.

375

Q. I call your attention to the writing "George S. German" appearing at the bottom of the entries and ask you if you recognize the handwriting? A. That is my signature.

Q. And from that signature can you tell us whether or not you checked off all of the names set forth on that particular page? A. I can so state.

Q. I show you a passport marked Government's Exhibit 5 in evidence, and direct your attention to the stamp reading "Immigration and Naturalization Service, Department of Labor, Arrived February 15, 1938," and ask you if you can tell us who placed that stamp on that passport? A. That is the stamp I placed on the passport.

376

George S. German—For Government—Direct.

Mr. Battle: I make the same objection to this line of testimony and ask that the objection go to the same line.

The Court: The same ruling.

Mr. Battle: My exception.

Q. Would you tell us briefly, Mr. German, the procedure that you employ in checking off passengers on an incoming passenger boat. A. Passengers are gathered in a convenient place, usually the smokers room or lounge, and these manifests are spread before us on a table. The passengers are required to pass by this table and present whatever evidence they have of admissibility to the United States. In the case of citizens there is a landing card and a passport or some other means of identification to enable him to enter the United States.

Q. When a passport is presented to you by a passenger do you compare that passport in any way with the individual who presented it? A. The picture is glanced at and a question is asked the person who presents it, and at that time a glance is taken to the person. There is a comparison made.

Q. You told us that you obtained from the incoming passenger some evidence of his right to enter this country. A. Yes, sir.

Q. Is that right? A. That is correct.

Q. Is a passport one of the methods used to establish the right of the passenger to enter this country?

Mr. Battle: I object to that, sir, calling for a conclusion on a question of law.

The Court: Overruled.

Mr. Battle: Exception.

Q. What is your answer, Mr. German? A. A United States passport is the most acceptable of evidence of citizenship of the United States to us as immigrant inspectors.

George S. German—For Government—Direct.

379

Q. And you can tell from examining the passport before you, Government's Exhibit 5, whether or not Mr. Browder on this occasion used that passport in establishing his citizenship?

Mr. Battle: I object to that as calling for a conclusion, and he should ask him what he did.

The Court: What is your recollection? What can you say after looking at the passport as to what he did?

Mr. Dunigan: May I change the question?

380

Q. Did Mr. Browder present that passport to you on February 15, 1938? A. I am able to state that he did.

Q. At the port of New York? A. Yes, sir.

Q. On February 15, 1938, do you recall, Mr. German, Mr. Browder's having presented that passport to you? A. I do recall that.

Q. Will you tell the Court and jury the circumstances of the occasion. A. Because of the confusion occasioned by the additional newspaper men and photographers. There was more confusion than usually in the examination room, which was held in the lounge or the smokeroom of the Aquitania.

381

Q. And it is because of those facts that you recall the incident now, is that correct? A. Yes, and in addition the additional persons who were permitted to ride the cutter down the bay who are not the usual staff of photographers and newspaper writers.

By the Court:

Q. How did you know that? A. What is that, sir?

Q. How did you know that? A. They are continually the same or very nearly the same men who come down for that work.

382

George S. German—For Government—Cross.

Q. These photographers looked different to you? A. Yes.

Q. In what way were they different? A. They were new faces.

Q. Were they pleasant faces? A. Agreeable, sir.

Mr. Dunigan: That is all, Mr. German. Thank you very much.

383

Cross Examination by Mr. Battle:

Q. Mr. German, you spoke of the other means of identification? A. Yes, sir.

Q. In addition to the passport. Just mention some of them. A. A naturalization certificate or a birth certificate, if you are able to establish that it is a bona fide birth certificate and you are the rightful owner of it.

Q. Any evidence that would satisfy the inspector of citizenship is what you were looking for? A. Yes, sir.

384

Q. And when Mr. Browder came in on this occasion there was no secrecy about his arrival? A. Oh, no. We knew he was coming on that ship because of conversations with newspaper men on the trip down the bay.

Q. You knew he was coming because there were people down there to welcome him? A. That is correct.

Mr. Battle: Thank you. That is all.

Mr. Dunigan: That is all. Mr. Stevenson.

Lawrence Stevenson—For Government—Direct.

385

LAWRENCE STEVENSON, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Dunigan:

Q. Mr. Stevenson, what is your occupation? A. Inspector of Customs, Port of New York.

Q. How long have you been in the customs service? A. Since August 1, 1935.

Q. Prior to that what was your occupation? A. I was a post office clerk in 1933.

386

Q. Tell us briefly; Mr. Stevenson, your duties as a customs inspector. A. Well, to examine baggage of incoming passengers from foreign countries, engage dutiable commodities, count passengers on excursion boats, and so forth.

Q. I show you Government's Exhibit 12 in evidence, and ask you if you have seen this paper before? A. Yes, I recognize that. That is the declaration I acted upon on February 15—

Q. On what date? A. On February 15, 1938.

Q. I call your attention to the writing in the lower left-hand corner in pencil. Do you recognize that writing? A. Yes, that is my writing.

387

Q. And can you tell from that writing the date of the arrival of the SS Aquitania? A. Yes, February 15, 1938.

Q. And the baggage declaration is in the name of what person? A. Earl Browder—Earl R. Browder.

Q. Do you recall the incident of the examination of Mr. Browder's baggage on the date that you have just mentioned, February 15, 1938? A. Yes, I do. There was quite a furore engendered by Mr. Browder's arrival. There was a number of press photographers there and a number of reporters.

Q. Will you tell the Court and jury, Mr. Stevenson, what conversations you had with Mr. Browder concerning his

388

Lawrence Stevenson—For Government—Cross.

baggage declaration, or those that you recall? A: Well, in baggage procedure it is necessary for the inspector to ask to have the passenger acknowledge his signature.

Q. And did you do so in this particular case? A. I did.

Q. Anything else? A. Well, it is also necessary to ask him whether he had declared everything brought back from abroad whether by purchase or otherwise, and I asked that question.

Q. Now, can you tell from the exhibit that you have—it is Government's Exhibit 11, is it? A. Exhibit 12.

389 Q. Exhibit 12—the date that you examined Mr. Browder's baggage? A. February 15, 1938.

Q. Is it customary to examine the passenger's baggage on the date of the arrival of the ship? A. It usually is, unless the passenger is held over by the immigration or for some other reason he is held as a hold-over passenger, as we call him.

Q. And you did examine Mr. Browder's baggage on this occasion on the date of the arrival of the vessel? A. I did.

Mr. Dunigan: That is all. Thank you, Mr. Stevenson.

390

Cross Examination by Mr. Battle:

Q. Did you examine the articles that are filled out on the application? A. I did, sir.

Q. Do you remember examining the number of chessmen? A. I saw a box. I didn't look into it.

Q. And two bottles of eau de cologne? Did you examine them? A. Yes.

Q. And toys? A. Yes.

Q. Was Mr. Browder's family down there to meet him? Wife and children? A. I don't know what the relationship

Kinard D. Abbott—For Government—Direct.

391

may have been. There were quite a few people there to greet him.

Q. You don't know whether his wife and children were there or not? A: I do not.

Mr. Battle: That is all.

Mr. Dunigan: That is all.

Mr. Werner: Mr. Abbott.

KINARD D. ABBOTT, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

392

Direct Examination by Mr. Werner:

Q. Mr. Abbott, what is your occupation? A. Naturalization examiner.

Q. What are the duties of a naturalization examiner? A. Well, to examine applicants for citizenship and to make investigations in connection with that and to make and preserve records and various other things.

Q. Mr. Abbott, can you tell us briefly the procedure with respect to an alien making an application for citizenship? A. Well, he submits an application and makes a declaration of intention and at some time after that has become two years old and he has completed the necessary residence, he then submits an application for a petition for citizenship which is filed in the court and he later comes before the court for a final hearing and his petition is acted on. He is admitted or denied.

393

Q. When an applicant makes a petition for naturalization is a duplicate of that petition kept in the files of the Department of Labor? A. It is. The original is retained by the clerk of the court and filed in his office. The

394

Nicholas Dozenberg—For Government—Direct.

duplicate is sent to the Commission of Immigration and Naturalization in Washington.

Q. That is not a copy; it is a duplicate original. A. It is a duplicate made in one operation with a carbon.

Q. And when a certificate of naturalization is issued to an individual is a duplicate original of that certificate of naturalization kept by the Department? A. It is.

(Papers marked Government's Exhibits 13 and 14 for identification.)

395

Q. I show you Government's Exhibit 13 for identification and ask you if that is a petition for naturalization from the files of the Department of Labor? A. Yes, sir.

Q. Such as you have referred to? A. Yes.

Q. And I show you Government's Exhibit 14 for identification and ask you if that is a duplicate original certificate of naturalization from the files of the Department of Labor? A. Yes, sir.

Q. And was Government's Exhibit 14 for identification a certificate issued on the petition Government's Exhibit 13 for identification? A. Yes, sir.

396

Mr. Werner: Thank you.

Mr. Battle: No questions.

NICHOLAS DOZENBERG, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Werner:

Q. Mr. Dozenberg, you have pleaded guilty to an indictment charging you with use of a passport secured by an

Nicholas Dozenberg—For Government—Direct.

397

application containing false statements? A. That is part of the indictment.

Mr. Battle: I object, and may I state the grounds of my objection to the testimony offered by this witness. I don't want to repeat unnecessarily, so I shall state all the grounds, and then if your Honor gives me a ruling it will cover subsequent proceedings. I object to any testimony given by this witness here on the ground that it is entirely immaterial and irrelevant; that it appears from the allegations in the indictment as already developed in this case that the application filed in the name of Nicholas Dozenberg was back in 1921, long prior to the Richards application; which is the passport which was the last previous passport before the present passport, the Browder passport. On that ground and upon the further ground that in every respect this testimony is entirely incompetent, immaterial and irrelevant; that it is too remote, it has no bearing on the issues that this jury is to try; I think it is highly prejudicial to the defendant, and I object to his being called as a witness. I object to any testimony he may give in this case on those grounds.

398

The Court: I will overrule your objections for the reasons that I have already given, when the motion was made before the start of the trial.

Mr. Battle: Exception. Will your Honor give me an exception to this whole line of testimony?

399

The Court: Yes. You won't have to repeat your objections. You have an exception.

Q. Mr. Dozenberg, I will reframe that question. Have you pleaded guilty in this court to an indictment charging you with the use of passports obtained upon applications containing false statements? A. Yes.

400

Nicholas Dozenberg—For Government—Direct.

Q. I show you Government's Exhibit 14 for identification and ask you if that is your signature on the line "Signature of holder"? A. Yes.

Q. And I show you Government's Exhibit 13 for identification and ask you if that is your signature on the line "Complete and true signature of petitioner"? A. Would you mind to explain what kind of document that is?

Q. Will you answer the question, Mr. Dozenberg? A. That signature is mine.

401

Q. And in both places where it appears above the line, "Complete and true signature of petitioner" it is your signature? A. Yes.

Q. Now, I show you Government's Exhibit 4 for identification and call your attention to a page with number 2990 on the top of it, and call your attention to the reverse of that page and ask you if you know whose picture appears on that? A. I would say that that picture appears to be Browder's picture.

Q. Mr. Earl Russell Browder? A. Earl Browder. Russell was not known to me.

402

Mr. Werner: I offer Government's Exhibit 4 for identification in evidence.

Mr. Battle: Same objection, on the same grounds.

The Court: What is this?

Mr. Werner: It is a passport application in the name of Nicholas Dozenberg, with a picture of Earl Browder—

The Court: I make the same ruling. Overrule the objection and give you an exception.

(Government's Exhibit 4 for identification received in evidence.)

Q. Now, Mr. Dozenberg, will you look at both sides of this application for passport and tell me if any of it is your handwriting?

Nicholas Dozenberg—For Government—Direct.

403

Mr. Battle: Is that the document just in evidence.

Mr. Werner: Government's Exhibit 4.

A. I would say that it is not in my handwriting.

Q. Did you make that application for passport? A. I did not.

Q. Now I call your attention to the fact that the application reads as follows: "I, Nicholas Dozenberg, a naturalized and loyal citizen of the United States, hereby apply to the Department of State at Washington for a passport. I solemnly swear that I was born at Riga, Russia, now Latvia." Is that where you were born? A. Correct.

404

Q. "On November 15, 1882." Is that when you were born? A. Yes.

Q. "That I emigrated to the United States, sailing from Stockholm." Is that where you sailed from? A. That is not where I sailed from.

Q. Where did you sail from? A. I sailed from Wilno.

Q. Well, did you sail about June 1904? A. I did.

Q. "That I resided 16 years uninterruptedly in the United States from 1904 to 1921." Is that correct, as applied to you? A. I am not in a position to say in all details whether that would exactly correspond with the record or not, but obviously it is.

405

Q. Is that your best recollection? A. That is the best of my recollection.

Q. "At Boston"—

Mr. Battle: There is another objection to this line of testimony here and that is this: the witness has already testified he did not make the application, so that I do not see that it is relevant or material or competent.

Mr. Werner: I am simply showing that the man who did make the application knew the correct facts about Mr. Dozenberg.

406

Nicholas Dozenberg—For Government—Direct.

Mr. Battle: This man says he knows nothing about it.

The Court: He is negating what is stated in the application.

Mr. Battle: This witness testified he didn't make the application. That is why I don't see how he can be examined on that application.

The Court: On what ground?

407

Mr. Battle: I object to it on the ground that he has already testified that he did not make the application and has no knowledge of it.

The Court: It purports to be made by him.

Mr. Battle: It has his name on it, yes, sir.

The Court: I will permit the testimony. You may have an exception.

Mr. Battle: I except.

Q. "That I resided 16 years uninterruptedly in the United States from 1904 to 1921 at Boston, Massachusetts, and New York, N. Y." Is that where you resided during that period? A. To the best of my recollection that is where I resided.

408

Q. "That I was naturalized a citizen of the United States before the District Court of the United States at Boston, Massachusetts." I show you Government's Exhibit 14 for identification, a naturalization certificate you have identified, and ask you if with that exhibit before you, 14, you can say that the statement appearing on the application, Exhibit 4, is correct and concerns Nicholas Dozenberg? A. It is correct except for Stockholm.

Q. Except for Stockholm? A. Yes.

Mr. Werner: I offer Government's Exhibit 14 for identification and Government's Exhibit 13 for identification, in evidence.

Mr. Battle: I make the same objection, if your Honor please.

Nicholas Dozenberg—For Government—Direct.

409

The Court: The same ruling.

Mr. Battle: Irrelevant and on all the grounds I mentioned before.

The Court: The same ruling.

(Government's Exhibits 13 and 14 for identification received in evidence.)

Q. "That I have resided outside the United States since my naturalization at the following places for the following periods." In 1921 had you resided anywhere outside the United States for any period? A. No.

410

Q. "My permanent residence being at 1309 Tremont Roxbury, Boston, in the State of"—

Mr. Battle: This is all taken subject to my objection.

The Court: Of course.

Mr. Battle: Exception.

Q. "My permanent residence being at 1309 Tremont Roxbury, Boston, in the State of Massachusetts." Was that where you were living about that time? A. I am not in a position at this time to say whether that is exactly the number, but I submit that it could have been.

411

Q. Was that about where you were living at that time?

A. It was nearly on the corner of Columbus and Tremont Streets.

Q. In Boston? A. In Roxbury, Boston, Massachusetts. It may have been that number.

Q. "Where I followed the occupation of machinist?" A. Correct.

Q. "That I am about to go abroad temporarily and intend to return to the United States within three months." In 1921, were you about to go abroad? A. I was not.

Q. "I intend to leave the United States from the port of New York, and sail on board the Hellig Olaf, March 17,

412

Nicholas Dozenberg—For Government—Direct.

1921." Did you intend to leave the United States? A. I had never had such intentions at that time.

Q. I call your attention to the signature. It says, "Signature of applicant, Nicholas Dozenberg." I ask you if that is your signature? A. In some respects it is, but in its totality it is not.

Q. Did you write the signature, "Nicholas Dozenberg" on Government's Exhibit 4 in evidence? A. I would say that I did not.

413

Q. Now I call your attention to the affidavit of the identifying witness: "I, Katherine Dozenberg, solemnly swear that I am a naturalized citizen of the United States." Were you married in 1921? A. I was.

Q. To whom? A. To Katherine Dozenberg.

Q. And is she still alive? A. She is not.

Q. Do you know when and where she died? A. She died on January 1, 1936, in Tientsin, China.

Q. "That I reside at 1309 Tremont Street, Roxbury, Boston." Was she living with you about that time? A. She was.

414

Q. Mr. Dozenberg, in the 1920's did you see Mr. Browder from time to time? A. I do not remember distinctively so, but it could have been that I met him.

Q. Well, did you see him from time to time? A. My recollection does not bring me to any specific time or place that I could say that I met him then and there, but considering the work I was doing—

Mr. Battle: I object.

A. (Continuing) At that time it could have been possible.

Mr. Battle: I object to any statement of that nature from the witness.

The Court: Yes, strike it out. What is your best recollection, Mr. Dozenberg?

Nicholas Dozenberg—For Government—Direct.

415

The Witness: I have no recollection definite, your Honor, on that score.

The Court: Well, when you say definite—I am not trying to pin you down to any particular place or street corner on a particular day and hour, but in general, what can you say with respect to seeing him?

The Witness: In general I would say it could have been, I have met Mr. Browder.

Q. Now, will you just answer the question. Did you see him from time to time?

416

Mr. Battle: I object to it on the ground the witness has already said—

The Court: No, I don't think he has answered it; not very satisfactorily.

Q. Did you see him from time to time?

Mr. Battle: I object.

The Court: Overruled.

Mr. Battle: Exception.

The Witness: Your Honor, there is no question that I had seen the defendant.

417

The Court: Well, why don't you just say yes or no.

The Witness: If I am asked the question whether at that time I had seen him, I am not in a position—

The Court: It is from 1920, as I remember the question.

Q. Did you see him from time to time in the 1920's? A. I can't repeat what I said before?

Q. Please answer the question, if you know. A. I don't know.

418

Nicholas Dozenberg—For Government—Direct.

Q. Over what period of time did you see Mr. Browder?

A. I should say after 1924.

Q. Yes. A. Up to about 1929 or 1930.

Q. Did you see him from time to time during that period? A. From time to time during that period.

Q. And did he look as he looks in Exhibit 4, the passport application, in the name of Dozenberg, the early time you met him? A. Unless he has a twin brother or a double, I would say he does.

419 Q. Now, in 1921, Mr. Dozenberg, did you go abroad on the S. S. Hellig Olaf? A. I did not.

Q. In 1921, did you go down to the passport agency? A. I did not.

Q. Any passport agency? A. I did not.

Q. I show you Government's Exhibit 14 in evidence, the naturalization certificate in your name, in which your signature appears, and ask you if you had the original of that certificate in your possession at the time it was issued?

A. At that time, yes, and after that time.

420 Q. And was there a period of time when you did not have it in your possession? A. Would you mind to make clear what do you mean by "in possession". On your person?

Q. In your possession or anyone else's possession. A. On your person or in your house?

Q. In your house or on your person? Both. A. What was the question again?

Q. Did there come a time in 1920, early 1920, when you did not have the original naturalization certificate in your possession? A. I do not correct—I do not recollect not having it in my possession either in the house or on my person.

Q. Did there come a time when you looked for that naturalization certificate? A. Yes.

Q. Did you find it? A. But that was considerably later. That was to the best of my recollection 1924.

Nicholas Dozenberg—For Government—Gross.

421

Q. And in 1924 you couldn't find it? A. I couldn't find it.

Q. When, if you recall, Mr. Dozenberg, was the first time that you saw Mr. Browder? About what date? A. I can not say. I do not remember it.

Q. What is your best recollection? A. You are placing me in a position—

Q. No. Will you please answer the question and we will get along much better. A. I answered the question to the best of my conviction, my belief and knowledge. I cannot specify any date. I have no recollection of any specific date or year when it could have been the first time I met Mr. Browder.

422

Q. Except some time in the '20's? A. Yes.

Q. Did you ever have any conversation with your wife Katherine about the loss of your naturalization certificate?

Mr. Battle: I certainly object to that, your Honor.

The Court: Objection sustained.

Mr. Werner: I don't ask for the conversation, your Honor.

The Court: I understand.

(Short recess.)

423

Q. One more question, Mr. Dozenberg. Did you ever obtain a passport made upon application, Government's Exhibit 4, which I show you? A. No.

Cross Examination by Mr. Battle:

Q. You testified that you had pleaded guilty to an indictment against you? A. Yes.

Q. And when was your case set down for sentence? A. I understood that it was supposed to be yesterday.

Q. And what happened when it was set down for sentence yesterday? A. I am not competent to say what happened because the whole matter was left to my attorney.

424

Nicholas Dozenberg—For Government—Re-direct.

Q. And was the sentence postponed? A. I just read in the newspaper that it had been postponed.

Q. You knew you were on for sentence yesterday and you were not sentenced, were you? A. That was my understanding, that I was supposed to be sentenced yesterday and now yesterday I learned to know that I will not be, because I wasn't.

Mr. Battle: That is all.

425

Re-direct Examination by Mr. Werner:

Q. Mr. Dozenberg, has anybody made any threats or promises to you? A. It has been emphasized that no promises will be made or are not being made.

The Court: Who emphasized it?

The Witness: Whoever questioned me.

426

IRA FORD HOYT, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Werner:

Q. What is your occupation, Mr. Hoyt? A. Passport agent.

Q. And how long have you been in that position? A. About 21 years.

Q. What are your duties as passport agent? A. To operate the passport agency in the Sub-Treasury Building in Wall Street and supervise the branch office at Rockefeller Center.

Q. Are you presently in charge of the passport agency in New York? A. Yes.

Ira Ford Hoyt—For Government—Direct.

427

Q. Was there a time, Mr. Hoyt, that a man named Philip H. Ahrens was passport agent in New York? A. No. He was agent of the Department of State.

Q. As agent of the Department of State was he qualified and authorized to have applications for passports executed before him? A. Yes, sir.

Q. Are you familiar with his handwriting? A. I am, sir.

Q. Is Mr. Ahrens still alive? A. No.

Q. I show you Government's Exhibit 4, a passport application in the name of Nicholas Dozenberg, and I ask you whether you recognize the handwriting of the agent of the Department of State? 428

Mr. Battle: I make the same objection.

The Court: The same ruling.

A. Yes, I do.

Mr. Battle: Exception.

Q. Whose handwriting is it? A. Mr. Ahrens.

Q. From looking at Government's Exhibit 4, can you state that the passport application was executed before him? A. Yes. 429

Q. You can so state? A. Yes.

Q. Will you look at Government's Exhibit 4 and state if you can where that passport was delivered, if a passport was issued on that application?

Mr. Battle: You mean so far as it appears from the record?

Mr. Werner: Yes.

Q. First I will ask you, can you state whether a passport was issued upon that application? A. Yes, there was a passport issued.

430

Ira Ford Hoyt—For Government—Direct.

The Court: What is the number of that application?

Mr. Werner: 2990. Government's Exhibit 4.

Q. Can you state where that passport was sent? A. It was sent to the passport agency then located in the Custom House.

Q. What city? A. New York City.

Q. When passports are sent to the passport agency in New York City, is a record kept by you of the passports which are received? A. Yes.

431

(Paper marked Government's Exhibit 15 for identification.)

Q. I show you Government's Exhibit 15 for identification and ask you if that is such a record? A. It is a record of the passports received in 1921.

Q. Will you examine Government's Exhibit 15 for identification and state if you can, whether or not that record reflects the receipt of a passport issued upon the application, Government's Exhibit 4 in evidence?

432

Mr. Battle: I object to that, your Honor. It calls for the contents of an instrument not in evidence.

Mr. Werner: I offer Government's Exhibit 15 for identification in evidence. Any objection?

Mr. Battle: Same objection to all this line of testimony.

The Court: Yes. Same ruling.

(Marked Government's Exhibit 15 in evidence.)

Q. Will you examine Government's Exhibit 15 in evidence Mr. Hoyt and state if you can whether that reflects the arrival at the Passport Agency of New York of the passport issued on the application, Government's Exhibit

Ira Ford Hoyt—For Government—Direct.

433

4, in the name of Nicholas Dozenberg? A. It was received there on the morning of March 13, 1921.

Q. Now, in 1921, Mr. Hoyt, were records kept concerning the delivery of passports? A. There weren't.

Q. To the applicant? A. No.

Q. To whom were passports delivered when they are sent to the Passport Agency? A. To the applicant in person or upon his written request, to another.

Q. And if the applicant comes in do you compare the picture on the passport with his appearance? A. Always.

Q. And if the applicant sends in a written request, do you compare the writing on the written request with his signature on the passport? A. We compare the signature on the written request with the signature on the passport.

434

Q. Have you any record of which you did in this case? A. No, sir.

Q. Was that passport called for? A. Yes.

Q. On what do you base that statement? A. That there is no record in the office of it being returned to Washington.

Q. For how long did you keep passports in the office before they are returned to Washington? A. Three months.

Q. And if they haven't been called for in three months then you return them to Washington? A. That is correct.

435

Mr. Werner: Thank you.

Mr. Battle: No questions. I move to strike out the testimony on the same grounds as previously urged.

The Court: Denied.

436

John O. Bell—For Government—Recalled, direct.

JOHN O. BELL, recalled, testified further as follows:

Direct Examination Continued by Mr. Werner:

Q. Mr. Bell, will you examine a passport application in the name of Nicholas Dozenberg, Government's Exhibit 4, before you, and tell his Honor and the jury what the markings on that application indicate in the same manner as you did on that Browder passport—

437

Mr. Battle: Same objection.

Q. (Continuing) application Government's Exhibit 2 in evidence.

Mr. Battle: We make the same objection, if your Honor please.

The Court: The same ruling.

Mr. Battle: On the same ground stated before. I respectfully except.

438

A. Well, the number appearing in the upper right hand corner of the application, 2990, is the number placed on the passport. The stamp immediately below that, Department of State, passport issued March 12, 1921, Washington, indicates that the passport was issued at Washington on that date. There is another stamp below that, and partly underneath it, which reads "Not to be amended without" I think the word is "express authorization of the Department of State."

There is also in that stamp some other language which has been marked out with a red pencil. This stamp indicates that a similar stamp was placed in the passport when issued; that was a limitation on the validity of the passport in accordance with certain wartime regulations which were then in effect. There is a name in blue crayon pen-

John O. Bell—For Government—Recalled, direct.

439

cil in the middle of the application, E. Robinette. That is the name of what is known as a junior examiner or person who assists in the examination of applications but does not have final authority to approve. Her name being placed on the application indicates that it appeared correct to her, and it was then submitted to a senior examiner whose name appears right beside hers. Then in red marks above her name is the date, 3/12. The name there is Covel. That is the name of the senior examiner who gave final approval to the application. 3/12 is the date it was done. On the side of the application is a stamp which says "Certificate of naturalization seen"— 440

Q. What does that indicate, Mr. Bell? A. That indicates that a certificate of naturalization was submitted at the passport agency when the application was executed.

Q. Can you tell us in whose name that certificate of naturalization was? A. The naturalization certificate was then certified in the name of Nicholas Dozenberg, establishing his naturalization on the date and place mentioned in the application.

Q. Would the facts in that naturalization certificate have to conform to the facts as stated in the passport application, Government's Exhibit 4, before the naturalization certificate would be accepted as proof of citizenship? A. Yes. 441

Q. When a naturalization certificate is presented as proof of citizenship, is that sent down to Washington or is that returned to the applicant when he makes his application and appears at the agency? A. If an application is executed at an agency, the certificate ordinarily would be returned to the applicant and not forwarded to Washington, if it agrees with the information in the application.

Q. Can you tell in this case whether the certificate was forwarded to Washington or returned to the applicant? A. I can tell it wasn't sent to Washington by the fact

442

John O. Bell—For Government—Recalled, direct.

that there appears right beside and in between the wording of this stamp the notation "Not," and then the abbreviated "att." meaning not attached, and also the initials beside that notation of the person who made it.

443

Q. Will you proceed with the markings? A. There is a red crayon marking down here in the space provided for the list of countries to be visited. It is to obliterate the names of towns which were put in the application erroneously. The space says "List countries," and they have put down the towns as well. Those were marked out. Then in addition there are some blue crayon markings on which the words—names of other countries; those are countries he would have had to visit en route in order to reach the particular country. The passport at that time stated in it specifically the countries for which it was valid. That is different from the present day passports which say "Valid for all travel in all countries unless otherwise limited."

444

There is also a word here in the space that had been filled out by the applicant, stating the purpose of his trip, and part of that has been marked over and changed by the examiner in blue pencil for the purpose of indicating to the person who wrote the passport what should be stated therein. That is just a change in language to comply with the usual procedure in writing the passport. Here is a stamp down at the bottom, the right hand side, "Fee received March 11, 1921," and a number, 4776, indicating that the passport fee was submitted and properly noted in the accounting record. On the back of the application there is a notation or—I don't know whether you would call it a notation, but there is a space provided for the applicant to indicate where he wants the passport sent, and the original entry by the applicant was changed; instead of sending it to the address he originally wanted it sent, he decided he wanted it sent to the passport agency,

John O. Bell—For Government—Recalled, cross.

445

and a notation was made there to send it to the passport agency, Custom House, New York.

Q. When the passport was issued on that application, Mr. Bell, did it contain a duplicate of the picture appearing on Government's Exhibit 4 in evidence? A. Yes.

Q. And in the name of Nicholas Dozenberg? A. Yes, the passport was in the name of Nicholas Dozenberg.

Mr. Werner: Thank you.

Cross Examination by Mr. Battle:

446

Q. Mr. Bell, you don't know anything about these matters about which you have been testifying personally? You had no personal contact? A. I wasn't there in 1921.

Q. All that you were testifying about is the general procedure that is followed, and explaining these notations from your knowledge of the general procedure, and you are not testifying to any particular facts in this particular case? A. I was not personally present.

Mr. Battle: That is all.

Mr. Werner: With your Honor's permission I would like to read Government's Exhibit 14 to the jury, the naturalization certificate.

The Court: Yes.

(Mr. Werner read naturalization certificate to the jury, Government's Exhibit 14.)

Mr. Dunigan: Bring in Mr. Powers.

447

448

George E. Powers—For Government—Direct..

GEORGE E. POWERS, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Mr. Dunigan: Mark these, please.
(Marked Government's Exhibits 16 and 16-A for identification.)

Direct Examination by Mr. Dunigan:

449

Q. What is your present occupation? A. Well, I am unemployed at the present time.

Q. How long have you been unemployed? A. Since last summer, since July.

Q. 1939? A. Yes.

Q. Prior to July, 1939, what was your occupation? A. I was employed by the International Workers Order.

Mr. Battle: By whom?

Mr. Dunigan: International Workers Order.

Q. Do you know the defendant in this case, Earl Russell Browder? A. I do.

450

Q. How long have you known the defendant Browder? A. Well, I have known him, roughly speaking, since he was general secretary of the Communist Party.

Q. Of the what? A. I have known of him, roughly speaking, since about the time that he became general secretary of the Communist Party.

Q. Do you know the date or the approximate date when he did become general secretary of the Communist Party? A. I couldn't name the exact date.

Q. Give us your best recollection. A. Somewhere in 1930 or 1931.

Q. And during the period since 1930 or '31 have you seen the defendant Browder from time to time? A. I have seen him at mass meetings.

George E. Powers—For Government—Direct.

451

Q. Yes. A. And I might see him passing along the street. Various occasions like that. I might say that I have had no dealings with him—no personal or organizational dealings, business dealings, or anything of that sort.

Q. I show you Government's Exhibit 16 for identification, and direct your attention to the reverse side of the paper and to the writing that I have indicated to you. Do you recognize that handwriting?

Mr. Battle: Now, if your Honor please, I wish to make this general objection to all this witness's testimony to avoid repetition. I object to it on the ground that it relates to a passport that was issued prior to the Richards' passport, which is conceded to be the last passport before the Browder passport; that it is incompetent, immaterial and irrelevant; that it is too remote; that it is not at all within the issues of this case, and that it is highly prejudicial to the defendant, and generally incompetent.

452

The Court: Overruled.

Mr. Battle: Exception.

Q. What is your answer to the question, Mr. Powers?

453

Mr. Battle: I will not repeat the objection to this line of testimony.

The Court: Quite right. It is understood that you have an objection and exception to all this testimony.

Q. Did you understand the last question? A. Yes.

Q. What is your answer? A. Well, it resembles my handwriting so closely that I could almost be sure of it, but I have no clear recollection of the occasion on which it was written.

Q. What is that? A. I have no clear recollection of the details surrounding the occasion when it was written, but,

454

George E. Powers—For Government—Direct.

obviously, it so closely resembles my handwriting that I practically could agree that it is.

Q. Would you say, Mr. Powers, that it is your handwriting? A. Well, as near as I could recollect or understand, I believe it is.

Q. You believe that it is your handwriting? A. I do.

Q. Now, I call your attention to the photograph appearing on Government's Exhibit 16 for identification, and ask you if you recognize that photograph? A. Well, it resembles Earl Browder, but it does not look exactly as he does today.

455

Q. As you know the defendant Browder, and as you knew him in 1930, would you say that that is a photograph of the defendant Browder? A. I would say it might be. There is a very good possibility.

Q. Well, is it? A. As I say, according to the best recollection I might have, I think it might be.

Q. Well, is it a photograph or a picture of the defendant Browder, Mr. Powers, as you knew him and as you know him now? A. Well, I think it is.

456

Mr. Dunigan: I will offer Government's Exhibit 16 for identification in evidence.

Mr. Battle: The same objection on the same ground as the objection to this general line of testimony.

The Court: The same ruling.

Mr. Battle: And may the objection apply particularly to this paper offered in evidence; and I ask that the objection continue in force.

The Court: Is that the original application?

Mr. Dunigan: Yes, it is, your Honor.

The Court: For the Morris passport?

Mr. Dunigan: Morris, yes.

The Court: What is the date of it?

George E. Powers—For Government—Direct.

457

Mr. Dunigan: The date is November 17, 1927.

The Court: November what?

Mr. Dunigan: November 17, 1927, is the date that the application was sworn to by the applicant.

(Government's Exhibit 16 for identification received in evidence.)

Mr. Battle: Exception to your Honor's ruling.

The Court: Of course.

(Mr. Dunigan read Government's Exhibit 16 to the jury.)

458

Q. Mr. Powers, you will recall that that passport application was executed in November, 1927. Do you have any recollection now of having gone to the Passport Agency in New York City and swearing as an identifying witness on the application? A. First of all, you didn't let me answer the first question you put to me.

Unless I had looked at that document I would not know not even the month or the year on which it was executed. I couldn't recollect it of my memory. But I assume it is so. So far as the recollection of the place is concerned, I can honestly tell you that since that took place over twelve years ago I haven't got the faintest recollection with assurance to state in what building or place—obviously some place in New York City—that the transaction took place.

459

Q. Well, do you recall having any conversations with any person concerning this particular application? A. Can't recall any conversation—any details of any conversation.

By the Court:

Q. Well, do you recall anything about being an identifying witness for any passport at or about this time? A. Well, I can recall to the extent that there must have been

460

George E. Powers—For Government—Direct.

my presence at some place with such a person, but so far as the details—

Q. Well, what is your recollection of that? A. I haven't got a clear recollection at all of it.

Q. Do you recall ever having been an identifying witness on an application for a passport in any case? A. In this particular instance—

Q. I am not saying about this one. In any? In other words, were you in the habit of acting as an identifying witness on applications for passports? A. No.

461 Q. Can you remember any one time or any two times when you did act as an identifying witness? A. As I stated, I can't recollect the details of it.

Q. Nobody is asking you to over this long period of time. A. That is right.

Q. But have you got any recollection of any kind? A. I cannot recollect any conversation on any phase of the matter.

Q. Nobody is asking you for a conversation. All I am asking is whether you ever can recollect any time when you acted as an identifying witness on an application for a passport. A. Well, on this particular occasion—

462 Q. You can on this particular occasion recollect that you did something, can't you? A. Something, but the details of it I can't.

Q. Nobody is asking you for the details. Have you any idea with whom you went at the time when on this particular occasion you served as an identifying witness? A. Well, with a man named George Morris.

Q. Do you know who George Morris is or was? A. At the time he was George Morris so far as I am concerned.

Q. Well, you have seen these papers that have been presented here, and as I understood it, you recognized the photograph which you say you think looks like Mr. Browder. A. Well, after I knew of Earl Browder being general secretary of the Communist Party, I did become

George E. Powers—For Government—Direct.

463

more and more convinced of the belief that it was one and the same man, if that is what you mean. But at the time the transaction took place I believed he was George Morris.

Q. I see. How did George Morris ever happen to ask you to go down to the Customs House to become an identifying witness? Have you got any recollection of that?

A. I can't recollect just how it happened. I can't recollect.

Q. Apparently it was somewhat of an unusual occasion in your lifetime; isn't that so? A. Well, not unusual in the sense that as a labor union official I was in the habit of going to various bureaus, such as the Compensation Bureau, with members of my organization.

464

Q. No, I don't mean that. It was unusual in the sense that you can't remember ever having done it before or since? In other words, you were not in the habit of signing promiscuously applications for passports? A. That is correct.

The Court: All right.

By Mr. Dunigan:

Q. Mr. Powers, how long had you known this person George Morris? A. Well, for a period of years—several years.

465

Q. And do you have any recollection now of the time when you first met George Morris? A. I have no clear recollection of those meetings.

Q. Well, in 1927 how long had you known George Morris? A. Well, to the best of my recollection now, for five or six years.

Q. And during that period of time did you see him frequently? A. Not so frequently.

Q. Did you know George Morris's occupation? A. No.

Q. Did you ever ask him what his occupation was? A. No. I didn't know him well enough,—

466

George E. Powers.—For Government—Direct.

Q. Did he ever tell you? A. I didn't know him well enough to ask him that question.

Q. What is that? A. I didn't know him well enough to ask him that question. I didn't make a social contact with him, so to speak, so close as that.

Q. What did you and George Morris have in common over the period of years that you knew him? A. Met him at various gatherings possibly, or affairs, bazaars, or social gatherings.

467

Q. What kind of affairs and meetings? A. Meetings held by workers' clubs, by organizations, or sections of the Communist Party.

Q. And during those meetings you would converse with him from time to time? A. I can't recollect any conversations in which he and I participated. Possibly various groups of people might have said, "How do you do. This is so-and-so," etc. But I have no recollection beyond the ordinary amenities of social contact.

Q. Where did these various meetings take place that you have related to us? A. That I can't recollect. I can't recollect. I can only suppose that in the halls and buildings in New York City.

468

Q. Of the various boroughs in New York City? A. Various halls and buildings in New York City used for such labor gatherings.

Q. I show you Government's Exhibit 16 in evidence again, Mr. Powers, and direct your attention to the oath of the identifying witness. Will you just read that printed portion above your signature? Will you read it out loud, Mr. Powers? A. It is not easy to read because the paper has been torn and it is folded somewhat. I will do the best I can.

"I, the undersigned, solemnly swear that I am a citizen of the United States; that I reside at the address written below—" then it is torn here, I can't make this out—"below

George E. Powers—For Government—Direct.

469

my signature hereto affixed; that I know the applicant who executed the affidavit hereinbefore set forth to be a citizen of the United States; that the statements made in the applicant's affidavit are true to the best of my knowledge and belief; further, I solemnly swear that I have known the applicant personally for five years."

Q. Now look again at Government's Exhibit 16, Mr. Powers, in evidence. On the first page of the application you will note that the applicant stated as follows: "I solemnly swear that I was born at Lawrence, Kansas, on May 20, 1891." Did you have any knowledge concerning the birth place of this alleged George Morris? A. No.

470

Q. Did you have any conversations with this alleged George Morris on that subject? A. No.

Q. You will note that the application reads further that the name of the applicant's father was William Morris who was born at Urbana, Illinois, and was deceased in 1912. Did you have any personal knowledge concerning those facts? A. No.

Q. Did you inquire of this alleged George Morris as to the name and birth place of his father? A. I can't recollect whether I did or not.

Q. Do you recall whether he said anything to you concerning the birth place and date of his father? A. I have no recollection.

471

Q. Now, will you note, if you look at the application, Mr. Powers, that it reads further, "I am domiciled in the United States, my permanent residence being 17 Christopher Street in the City of New York." Did you know whether or not this alleged George Morris in fact lived at 17 Christopher Street in this city? A. I can't recollect whether I—I might have known it at the time, but at this time I can't say with certainty. I can't recollect that knowledge that I might have had.

Q. Did you ever visit this alleged George Morris at that address? A. No.

472

George E. Powers—For Government—Direct.

Q. Did you have any conversation with any other persons as to whether or not George Morris lived at 17 Christopher Street? A. Not to my recollection.

Q. Did he tell you that he lived there? A. That I can't recollect.

Q. Did you ask him? A. I couldn't recollect that either.

473

Q. Did this alleged George Morris, Mr. Powers, at the time you accompanied him to the Passport Agency and swore to his application as an identifying witness, tell you the countries that he expected to visit after he obtained his passport? A. I can't recollect that. I am sorry I have to repeat the word "recollect" so much. As I stated at the outset I can't recollect any of the details that might have taken place. I unfortunately can not recall.

Q. Did you ever visit George Morris over the period of years that you said you have known him, at his home? A. I don't remember having done so.

Q. What was your answer? A. I don't remember having done so.

Q. Do you recall whether he ever visited you at your home? A. I don't believe so.

474

Q. Did you know the names of any other persons who knew this alleged George Morris? A. I can't remember.

Q. Well, did you ever speak to him when he was in company with other persons over the period of years which you stated you have known him? A. I can only say that he must have spoken to me or I might have said something to him, but any positive knowledge or recollection I don't possess.

Q. Well, you swore on the application that you had known him personally for five years? A. Yes, that is meeting him infrequently but not developing a close relationship or friendship or anything of that sort.

Q. Now, if you will examine the application before you, Mr. Powers,—it is Government's Exhibit 16 in evidence—

George E. Powers—For Government—Direct.

475

and on the reverse side you will note that the applicant gave as his occupation journalist. Do you see that? A. Yes.

Q. Did you know whether or not this alleged George Morris was in fact a journalist? A. I can't recollect whether I knew him as such at that time or not.

Q. Well, did you ask him whether or not he was a journalist? A. I don't believe so. I don't recollect.

Q. Did you read his application at the time you swore to it as an identifying witness? A. All I can say is that I must have done so, but I can't recall the act.

Q. Well, didn't you? A. I presume—all I can say is 476 that I can presume so. Anything that I am positive of I will tell you, but I can not say with positive certainty something that I have to reconstruct that accords with this thing, because, as I stated, Mr. Dunigan, in the Grand Jury, this whole transaction took place so long ago that I had practically forgotten about the whole matter until it was called to my attention by presenting me with this document.

Q. How many times, Mr. Powers, to your knowledge have you gone to the Passport Agency and sworn to applications as an identifying witness? A. To the best of my recollection I believe this is the only time. But it may be it may have happened, because as I stated, I have been in 477 the habit as a labor union official in going to various government buildings in compensation matters and other things of that character on behalf of various people, members of the organization, and so on. I may have done something of that kind. I wouldn't say with definite certainty at this time unless I had documentary evidence that would refresh my mind upon the matter.

Q. You remember going to government buildings in connection with compensation matters. Do you remember going in connection with passport matters? A. I don't recollect. I don't recall.

Q. Have you ever obtained a passport yourself? A. No. That I can state definitely. I never have.

478

George E. Powers—For Government—Direct.

Q. So to the best of your recollection this is the only time that you went to the Passport Agency?

The Court: Anything more you want to ask him?
I think we have had enough of this.

A. To the best of my recollection and belief I guess.

Q. You told us that you met the defendant Browder about 1930 or 1931. Is that correct? A. I would say that I met him at that time, but that I knew of his being general secretary of the Communist Party when he became such.

479

Q. Well, can you give us the approximate date when you first met Earl Browder face to face under the name of Earl Browder? A. I can't recall any date.

Q. Well, what is the best date that you can fix for us? A. I can't recall any date. The fact is that I have seen him at mass meetings and so on at which he spoke as representative of the Communist Party.

Q. Well, now, can you fix the approximate date of the first mass meeting or other type of meeting that you saw Earl Browder speak or heard him speak? A. It is so long ago that I can't recall anything about it.

480

Q. Would it have been about 1930 or 1931? A. It might have been about that time.

Q. On the first occasion when you did see him speak at a mass meeting were you surprised in any way? A. I can't recall my thoughts or sensations or feelings at that time. But I did state—I want to say, as I stated,—

The Court: Was the oratory good?

The Witness: It generally was.

Q. Well, at the time when you saw him at the first mass meeting did your trip down to the Passport Agency come back to your mind? A. I don't believe—well, I can't answer that question definitely. I would only be guessing, and I don't think you want guesses.

Elma V. Waldron—For Government—Recalled, direct.

481

Q. At the time when you first saw the defendant Browder speak at a mass meeting did you associate his appearance in any way with your trip down to the Passport Agency?
A. I can't say that that was the case. Not the first time necessarily.

Mr. Battle: Will your Honor allow me to defer my cross-examination until tomorrow morning?

The Court: Yes, I think so. How long will it take?

Mr. Battle: I can't tell, your Honor. I hope not long. 482

The Court: Half past ten tomorrow morning.

(Adjourned to Friday, January 19, 1940, at ten-thirty a. m.)

New York, January 19, 1940, 10:30 a. m.

(Trial resumed.)

Mr. Cahill: Any cross-examination of Mr. Powers?

Mr. Battle: Yes, I want to ask him a few questions.
(Witness Powers not present.) 483

Mr. Cahill: Suppose we go on to something else.

The Court: Yes.

ELMA V. WALDRON, recalled as a witness on behalf of the Government, testified further as follows:

Direct Examination by Mr. Werner:

Q. Mr. Waldron, you have previously testified that you are an agent of the Department of State in the New York Passport Agency? A. Yes, sir.

484

Elma V. Waldron—For Government—Recalled, direct.

Q. And how long have you been such? A. Over twenty years.

Q. And as such are you authorized to administer oaths in connection with applications for passports? A. I am.

Q. I show you Government's Exhibit 16 in evidence and 16-A for identification, and ask you if you can state whether you have seen them before? A. Yes, sir.

Q. When?

485

Mr. Battle: I make the same objection, if your Honor please—

The Court: The same ruling.

Mr. Battle: —as to all the other testimony in regard to Morris and Dozenberg, on the same grounds, and an exception.

Q. When, Mr. Waldron, was the first time? A. Well, I refer to the date on here, November 17, 1927.

Q. On that date did a man come before you and acknowledge his signature on that application? A. Yes, sir.

The Court: What was the date?

486

The Witness: November 17, 1927.

Q. And likewise, did an identifying witness come before you and acknowledge his signature and take an oath? A. Yes.

Q. Now, Mr. Waldron, how many passport applications have been executed before you since the date of Government's Exhibit 16 in evidence approximately? A. Around the thousands I guess.

Q. A thousand? A. Oh, yes, more or less.

Mr. Battle: In the thousands.

Q. And do you recall each and every one of these applications? A. No.

Elma V. Waldron—For Government—Recalled, direct.

487

Q. Have you any specific recollection of the application before you, Government's Exhibit 16 in evidence, and 16-A for identification? A. Only that my signature appears thereon.

Q. When an applicant appears before you, Mr. Waldron, he presents two identical photographs of himself, does he not? A. Yes, sir.

Q. And do you compare the photographs that he presents with his appearance at the time that he presents them? A. Yes, sir.

Q. And by looking at Government's Exhibit 16 in evidence can you state that the application who appeared before you with that application looked like that photograph? A. Yes.

488

Q. Mr. Waldron, have you an invariable practice that you follow with respect to applicants for passports? A. Yes.

Q. And did you follow it in the case of Government's Exhibit 16 in evidence and 16-A for identification? A. Yes.

Q. Will you tell his Honor and the jury just what you said to the applicant and just what occurred?

Mr. Battle: I make the same objection and I further object to the question in that form. I have no objection to his stating, at least subject to the other objections. I would have no objection to his questioning under my previous objection, but I do object to his questioning in this form as to what he said to this applicant, because the witness says he has no recollection of any specific question. He is simply testifying from general procedure.

489

The Court: Overruled.

Mr. Battle: I object to the form of the question in asking the witness what his personal recollection was. I except.

490

Elma V. Waldron—For Government—Recalled, direct.

Q. Do you ask all applicants the same questions or a series of basic questions? A. A series of basic questions, yes.

Q. Will you tell his Honor and the jury what those questions are, and if you can, look at Government's Exhibit 16 in evidence and 16-A for identification, state what that indicates the applicant answered? A. "Did you ever have a passport before?"

491

Q. And can you tell from looking at Government's Exhibit 16 in evidence what the applicant answered? A. "No," or "None."

Q. Mr. Waldron, when you say "No," you don't mean that you can't recollect; you mean that the applicant answered "No"? A. That is correct.

Q. And what else did you say? A. "Do you solemnly swear the statements in your affidavit to be true?"

Q. And can you tell by looking at Government's Exhibit 16 in evidence, what the applicant answered? A. Yes.

Q. What did he answer? A. "Yes."

492

Q. Can you also tell by looking at Government's Exhibit 16 in evidence, what you asked the identifying witness? A. "Do you solemnly swear the statements in your affidavit to be true?"

Q. And can you tell from looking at Government's Exhibit 16 in evidence who the identifying witness was? A. George Edward Powers.

Q. What did Mr. Powers answer? A. "Yes."

Q. Now, what proof of citizenship did the applicant submit with the application for a passport, Government's Exhibit 16 in evidence? A. An affidavit executed by Martha Morris.

Q. Is that Government's Exhibit 16-A? A. I couldn't tell you that.

Q. (Indicating on paper to witness.) A. Yes.

Mr. Werner: I offer Government's Exhibit 16-A for identification in evidence.

Elma V. Waldron—For Government—Recalled, direct.

493

Mr. Battle: I object to it on all the grounds mentioned before; on the ground that it is incompetent and immaterial.

The Court: Same ruling.

Mr. Battle: And does not come within the issues in this case; it is too remote; highly prejudicial, and that it is in every respect incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Battle: I except.

(Government's Exhibit 16-A for identification received in evidence.)

494

(Paper marked Government's Exhibit 17 for identification.)

Mr. Werner: I offer Government's Exhibit 17 for identification in evidence.

Mr. Battle: No objection. Will you read it to the jury.

Mr. Werner: I will read it.

(Government's Exhibit 17 for identification received in evidence.)

(A paper is marked Government's Exhibit 18 for identification.)

Mr. Werner: I offer Government's Exhibit 18 for identification in evidence.

495

Mr. Battle: Is that under the stipulation?

Mr. Werner: Yes.

Mr. Battle: No objection.

(Government's Exhibit 18 for identification received in evidence.)

Mr. Werner: May I read these to the jury?

The Court: Yes.

(Government's Exhibits 16, 16-A and 17 read to the jury.)

Mr. Battle: There was something you read from the application in which you said "My last pass-

496

Elma V. Waldron—For Government—Recalled, cross.

port was obtained from—None.” Will you read the rest of it?

Mr. Werner: There is nothing else filled in there. Suppose we show it to the jury.

Mr. Battle: I will read this sentence: “My last passport was obtained from—None”, and under this is written the words, “Washington or location of office address on blank,” and the word “Date” written underneath “And was” blank. Underneath that is written, “Disposition of passport.”

497

By Mr. Werner:

Q. Mr. Waldron, after that application for a passport had been executed before you, what did you do with the application and affidavit; that is, Government's Exhibits 16 and 16-A in evidence? A. It was forwarded to the Department, if that is what you mean, for consideration.

Q. The Department where? A. Department of State, Washington, D. C.

Mr. Werner: That is all.

498

Cross Examination by Mr. Battle:

Q. Mr. Waldron, I just want to make it perfectly clear: have you any idea how many thousand applications for passports you have had since 1927? A. I couldn't tell you that, only approximately. There are so many.

Q. You don't pretend to have any independent recollection of the circumstances of any particular application, do you? A. Well, some I do and some I don't.

Q. As to this one, do you have any independent recollection? A. Not as to this one, no.

Q. So your testimony as to this application is merely based on what your general practice was? A. Yes.

John O. Bell—For Government—Recalled, direct.

499

Q. And of course you don't mean to say that your practice may not on occasion have varied in these thousands of cases? A. Very seldom.

Q. You are not a machine, you are a man. A. Well, I am pretty nearly a machine.

Mr. Battle: That is all.

JOHN O. BELL, recalled as a witness on behalf of the Government.

500

Mr. Werner: Your Honor, with Mr. Battle's consent I should like to make Exhibit 16-A a part of Exhibit 16. It is really a part of 16.

The Court: Well, why not leave them as they are.

Mr. Werner: If your Honor prefers that, all right. They were both sent in together and they should be attached together.

The Court: They can be attached. I can't see any reason why they shouldn't stay as they are.

501

Direct Examination by Mr. Werner:

Q. Mr. Bell, will you examine Government's Exhibit 16 in evidence and 16-A in evidence, and state, if you can, whether that application for passport with its accompanying affidavit was forwarded and received at the passport division of the Department of State at Washington?

Mr. Battle: Same objection, your Honor, on the same grounds.

The Court: Same ruling.

Mr. Battle: Exception.

502

John O. Bell—For Government—Recalled, direct.

A. Yes, this application does indicate that it was received in the Department.

503

Q. Now, in the same manner as you have explained the markings on the Dozenberg passport application, and on the Browder passport application, Government's Exhibit 2, would you explain to his Honor and the jury the course which the passport application, Government's Exhibit 16, and the affidavit, Government's Exhibit 16-A, comprising the Morris application, took at the Department? A. The application indicates that it was received in the Department. It is stamped in the lower right hand corner, "Fee received November 19, 1927," the date upon which the fee was received, and the number immediately below that is the fee number for accounting records. The number in the upper right hand corner 475085, is the number of the passport, and the stamp below that "Passport issued November 19, 1927, Department of State," indicates that a passport was issued on that date.

504

The blue crayon marks are made by the junior examiner. His name is on the application, "James," and the date upon which he gave initial approval to the application. The red crayon marks are made by the senior examiner who gave final approval to the application on the date below her initials. The stamp on the right hand corner above the fee stamp, says "Filed November 23, 1927," and indicates that the application was placed in the files of the Department on that date.

Another file stamp right beside it, "Filed April 26, 1929" indicates that the application had been withdrawn and was refiled on that date in April, 1929. The stamp on the right hand side, "Recorded in the Fraud file as a suspect, 12/2/29, Wright," is an indication that a reference was made from this application to another file of the Department on that particular date, by Miss Wright, an employe of the Department. The back of the application bears only one notation other than that written in ink, and

John O. Bell—For Government—Recalled, direct.

505

that is a crayon notation which I think was also written by the applicant; that was not put on by the Department.

Government's Exhibit 16-A is an affidavit submitted with this application as proof of birth in the United States. It does not bear any marking.

Q. And that was accepted as proof of citizenship, Government's Exhibit 16-A? A. This affidavit was accepted in lieu of a birth certificate.

(Paper marked Government's Exhibit 19 for identification.)

506

Q. Mr. Bell, by looking at the application, Government's Exhibit 16 in evidence, can you state if a passport was issued? A. A passport was issued as indicated by the stamp.

Q. On what date? A. November 19, 1927.

Q. Can you also state how that passport was sent out from the Department? A. Yes. The application indicates that the passport was sent out by registered mail to the address specified in the application, "George Morris, care of Williams, 17 Christopher Street, New York City, New York."

Q. And are records kept by the Department of registered mail leaving the Department? A. Yes, we keep a daily record of such.

507

Q. I show you Government's Exhibit 19 for identification and ask you if that is such a record? A. Yes, this is the record of passports sent by registered mail on November 21, 1927.

Mr. Werner: I offer Government's Exhibit 19 for identification in evidence.

Mr. Battle: No objection, of course, except subject to the other objections made. I have no specific objection to this.

508

John O. Bell—For Government—Recalled, cross.

The Court: Yes.

(Government's Exhibit 19 for identification received in evidence.)

509

Q. I show you Government's Exhibit 19 in evidence and ask you if you can state when the George Morris passport which you have referred to was sent out by the Department? A. Yes. On the third page of Government's Exhibit 19, there is an entry with a number preceding it. That is the registered number placed on the envelope, 702412, and followed by the words "Morris, George, care of Williams, 17 Christopher Street, New York City."

Q. Now, do you know, Mr. Bell, whether or not that passport was returned to the Department for non-delivery? A. When a passport is returned, a reference is made on the application as a part of the file. There is no such record in this case.

Mr. Werner: Thank you.

Cross Examination by Mr. Battle:

510

Q. Mr. Bell, this application has the entry on it of—

Mr. Battle: What is the exhibit number, Mr. Werner?

Mr. Werner: Exhibit No. 16.

Q. (Continuing) Has the entry, "Passport issued November 19, 1927." That indicates that the passport was actually issued on that date, doesn't it? A. That is correct.

Q. And the application indicates that the applicant desired the passport to visit the countries of Germany, France and England? A. That is what it stated.

Q. And that is what was on the application. Now, this entry that you spoke of on the side, is that "Recorded"? Is that the word "Recorded"? A. That is right.

John O. Bell—For Government—Recalled, cross.

511

Q. "Recorded in the Fraud File as suspect 12/2/29." Underneath that is the word "Knight" or "Wright"? A. W-r-i-g-h-t.

Q. You say Miss Wright was a clerk there at that time? A. That is right.

Q. What are her duties? A. Miss Wright was drafting clerk in the Fraud Section, dealing with applications in which some doubt existed as to authenticity.

Q. Well, this entry here indicates that some doubt existed as to the authenticity of this application at the time? A. It indicates that in 1929, two years after the issuance

512

of the passport, there was reason to suspect that this application was not bona fide.

Q. And that there was an investigation made on that subject? A. Not necessarily that there was an investigation made.

Q. But it was regarded— A. It was regarded as possibly fraudulent.

Q. To such an extent that it was recorded in the fraud file? A. That is right.

Q. A suspect. And by whom is that fraud file handled? By whom was it handled? A. The fraud file is and always has been under the direct supervision of Mr. Nicholas here at the table.

513

Q. And this is Mr. Nicholas here? A. That is correct.

Q. And that "12/2/29", that is the 2nd of December, 1929, is it not? A. That is correct.

Q. Does that indicate that the recording was on that date? A. Yes.

Q. And that the investigation, or whatever proceedings were had, were about that time? A. It doesn't necessarily indicate that there was any investigation at all.

Q. What does it indicate? A. It indicates that there was some information available to Miss Wright, or furnished to her—I don't know from what source in this particular case—indicating that there was reason to sus-

514

John O. Bell—For Government—Recalled, re-direct.

pect that this application was not bona fide, sufficient for her to record it.

Q. And that information was filed then? A. That is correct.

Q. You have no personal knowledge yourself as to this recording being recorded by the fraud file, I suspect? A. No, sir.

Q. The matter was not called to your attention at that time? A. No, sir. I was not in the fraud section at that time.

515

Q. Are you in the fraud section now? A. No, but I have been.

Q. Since that time? A. Since that time.

Q. But you had no personal knowledge about this? A. No.

Mr. Battle: That is all.

Re-direct Examination by Mr. Werner:

516

Q. Mr. Bell, in the event that a passport application such as Government's Exhibit 16 in evidence is referred to the fraud file, in the event that the Department knows or has reason to believe that that passport application was made by someone with a name other than the name appearing on the application, would that fact be noted by cross indexing on the application? A. I am afraid I don't understand your question very clearly.

Q. In the event that the Department found out that a passport application in one name had some connection with an individual in another name, would that fact be indicated in the cross reference file of the Department? A. Yes.

Q. And is there any indication of such knowledge by the Department in this case? A. The only indication here is that there was some suspicion.

John O. Bell—For Government—Recalled, re-cross.

517

Q. And there is no indication that the Department knew that the applicant in this case had any other name, is there? A. No, there is not.

Mr. Werner: Thank you.

Re-cross Examination by Mr. Battle:

Q. The entry does indicate that they suspected that? A. The entry indicates that there was suspicion that the person who obtained this passport was not George Morris.

518

Q. There was that suspicion in 1929, and that suspicion was sufficiently definite to have the application recorded in the fraud file formally? A. We do that whenever there are any suspicions.

Q. The suspicion was regarded as of sufficient importance to have it so recorded, was it? A. Yes.

Mr. Battle: That is all.

Mr. Cahill: Call Mr. Powers.

GEORGE E. POWERS, resumed the stand:

519

Cross Examination by Mr. Battle:

Q. Mr. Powers, do you recall an investigation made by the Government in 1929, concerning this application in the name of George Morris? A. I do recall something about such an investigation.

Q. What do you recall? A. Of course, I haven't got a very clear picture of it—it is quite a long time ago—but as well as I can recall, I can't recall the name of the gentleman, but there was a man of the Department of Justice, I believe—I may not be certain of that either—

520

George E. Powers—For Government—Cross.

but at least he was a Government official and he interviewed me.

By the Court:

Q. How do you know that? A. I beg your pardon?

Q. How do you know he was a Government official? A. Well, he purported to be; I will put it that way.

Q. You were not certain of it? A. I have no way of telling.

521

Q. Your recollection is not very clear? A. My recollection is well, it is just a recollection.

Q. You think he was a Government agent? A. To the best of my knowledge and belief.

Q. He might have been from the Department of Justice? A. Might have been from the Department of Justice.

Q. Or even from the Department of Commerce? A. I don't know about that, but to the best of my belief, he was from the Department of Justice.

Q. But you can't be sure? A. I can't be sure.

By Mr. Battle:

522

Q. That is your best recollection? A. That is my best recollection.

Q. Will you state what took place? A. As I recall it, there was some kind of a conference held. He wanted to see me and I wanted to see him with my lawyer. At that time my lawyer was, as I recall it, Joseph Brodsky. I can't recall anything that went on very definitely except that we—

Mr. Cahill: Can we have names and places, Judge? So that we have some basis here.

Mr. Battle: In 1929 I asked him about.

George E. Powers—For Government—Cross.

523

The Witness: I would say it might have been around 1929.

Mr. Cahill: Who is the individual with whom the conversation is said to have been had? May we have the name?

The Witness: I don't know the name. I can't recollect the name.

By the Court:

Q. You did mention Mr. Brodsky. A. Mr. Brodsky was the attorney.

524

Q. He sat in with you? A. The only reason I can say Mr. Brodsky, is because usually Mr. Brodsky represented my interests in the legal sense.

Mr. Cahill: I hate to interrupt, but I must have some dates, some information on the identity of these people. What is the name of this official, and describe his credentials at least.

By Mr. Battle:

Q. This Government official, do you recall his name? A. I cannot recall his name. 525

Q. Did he show any badge or authority? A. Yes, as well as I can recall.

Q. What did that badge indicate as to his connection with the Government?

Mr. Cahill: I object to that. Let us have the badge described if we are going into it.

The Court: Well, he can't quite be sure.

Q. What is your best recollection? A. To the best of my knowledge and recollection—of course, I can't describe a badge. It is ten years ago. It would be ridiculous. But

526

George E. Powers—For Government—Cross.

to the best of my knowledge and belief it was from the Department of Justice.

The Court: Why do you say it is ridiculous?
Merely because the jury smiled?
(No answer.)

Q. Where was this conference held? A. As I recollect it, it was in Mr. Brodsky's office.

Q. Well, state what took place at the conference. State what was said and done.

527

Mr. Cahill: If your Honor please, it is going to be extremely difficult to have any re-direct unless we have some names.

Mr. Battle: I have given the name and place—Joseph Brodsky. The other person, he doesn't know what his name was.

By the Court:

Q. Some time in 1929, that is how many years ago, if you can remember? A. Over ten years.

528

Q. Are you sure it is 1929? A. I am not certain of that.

Q. It might have been 1930? A. I would have to have some record or something to establish that.

Q. You have no record? A. I have none.

Q. And where was Mr. Brodsky's office at that time? A. I am not sure of the exact address.

Q. It was in New York City, though? A. Yes.

Q. That is a big town? A. I am positive it was New York City.

Q. Do you think it was in the Borough of Manhattan? A. Very likely.

George E. Powers—For Government—Cross.

529

By Mr. Battle:

Q. Will you tell us then what took place? A. I have no recollection of the details.

Q. What was the general subject of the conversation?

A. The George Morris passport.

Mr. Cahill: Unless there can be some identification here, I object to it because talking with an unknown person whom he thinks was connected with the Department of Justice, that affords no proper basis for—

530

Mr. Battle: He says he was talking with the man.

The Court: I will let him testify and you can cross-examine. If you can get anything out of him on cross examination you are entitled to it.

Q. Will you continue and state what took place to the best of your recollection? A. To the best of my recollection, this man, this unnamed man, asked me questions about a passport. As I recollect it, this George Morris passport.

Q. Was Mr. Browder's name mentioned in the conference? A. Yes, I think it was, as I recollect it.

531

Q. And the subject of the conference was as to whether Mr. Browder and Mr. Morris were the same person? A. I believe something along that line.

Q. Along that line. And how long did the conference last? A. I couldn't say with any exactitude. It might have been twenty minutes, it might have been twenty-five minutes, or a half hour. Something like that. It didn't take very long. It might have been fifteen minutes.

Q. Did you hear any more about the matter? A. Not a thing.

Q. At that time were you asked whether, to the best of your recollection, Mr. Morris and Mr. Brodsky were the same person? A. Mr. Browder, you mean.

532

George E. Powers--For Government--Cross.

Q. Mr. Browder. I beg your pardon. A. As I recollect it, yes.

Mr. Battle: That is all.

By the Court:

Q. And what did you say? A. Well, my response, as I recollect it, was simply a yes or no answer.

Mr. Cahill: Louder.

533

A. (Continuing) A yes or no answer for the most part, as well as I can recollect.

Q. What was the answer, as you recollect? A. That regarded this Morris passport, that I recognized my signature, I believe, or something of that kind.

Q. I understood you to say that your recollection was, if you could recollect—the question was whether Morris was Browder, and I am asking you if you can recall what your answer to that question was? A. Well, first of all, I can't say with exactitude—I can't recollect exactly what questions were asked of me by that man.

534

Q. Why, you just stated in answer to Mr. Battle's question that the general topic of conversation was whether Mr. Morris was Mr. Browder. Is that still your recollection? A. In a general sense, yes.

Q. Yes. A. In a general sense.

Q. Now, I am asking you, what, if any, information you gave to this anonymous man with respect to that question? A. Well, to the best of my knowledge, that Mr. Morris was Mr. Morris.

Q. That is what you told him? That Mr. Morris was Mr. Morris? A. Yes.

Q. And not Mr. Browder? A. Yes.

Q. And then he went away, he was satisfied? A. That is right.

George E. Powers—For Government—Re-direct.

535

Q. Was that a correct answer, as you look back? A. It was correct at the time.

Q. That was 1929? A. To the best of my knowledge.

Re-direct. Examination by MA Dunigan:

Q. Mr. Powers, when you were visited by this man whose name you cannot recall, but whom you have identified as a Government man, he showed you some papers, did he? A. First of all, I don't recollect that he had visited me.

Q. Well, did you visit him? A. Neither. It happened neither way. As I recollect it, we both visited Mr. Brodsky.

536

Q. And you stated that Mr. Brodsky was your attorney at that time? A. Well, I usually utilized his services.

Q. When this meeting took place, did you see some papers of any kind? A. I can recollect in general papers, but I couldn't say exactly how many papers.

Q. Were you shown a paper or papers with some photographs on? A. To my recollection, I believe I was.

Q. You believe that you were. A. Yes.

Q. You stated that you were questioned concerning one George Morris; is that true? A. To the best of my recollection.

Q. You and Mr. Brodsky and the agent—the Government man as you called him—were all present? A. Yes.

537

Q. Do you know whether or not Mr. Brodsky was Mr. Browder's attorney at that time also? A. I don't know.

Q. Now, what did you say to the Government agent when these photographs were shown to you and you were questioned about George Morris? Give us all of the conversation that you can recall. A. Well, I can't recall anything of the conversation in its exact aspects. All I can do is try to reconstruct as well as I can what might have taken place.

Q. Try your best to reconstruct what took place and tell us as best you can. A. There were some questions

538

George E. Powers—For Government—Re-direct.

asked about this passport application, and to the best of my knowledge and belief it was the same document that was shown to me yesterday.

Q. Yes. A. I believe it was. I might be mistaken. But to the best of my understanding it probably was.

Q. Weren't you asked if the photograph appearing on the paper was not a photograph of Earl Browder? Wasn't that question put to you? A. Yes.

Q. And what did you say? A. My answer, as I recollect it, at that time was that that was George Morris.

539 Q. Did Mr. Brodsky see the picture? A. I don't know.

Q. Why did you feel it necessary to have a lawyer on this occasion, Mr. Powers? A. Well, as a labor union representative, and at that time I was involved in—I believe if I recollect rightly—I think there was a strike in process at the time, and labor representatives, when they are accosted by either City or State or National Government representatives, they usually are represented by lawyers. That is a common procedure.

Q. Well, you were the identifying witness on the application, were you not? A. Yes, as I recollect.

540 Q. And you swore to an affidavit that you had known the applicant personally for five years, isn't that true? A: That is true.

Q. Now you said that you first met Mr. Browder about 1930 or 1931? A. Yes, as I recollect.

Q. You swore you saw him face to face at that time, isn't that true? A. I can't be sure of that. As I stated yesterday, I might have seen him at mass meetings. I might have seen him at some other gatherings, but I have no clear recollection under what circumstances I might have seen him.

Q. That is, you saw him at mass meetings and you heard him speak? A. That is correct in general, yes.

Q. And you saw his physical appearance, didn't you? A: That is true.

George E. Powers—For Government—Re-direct.

541

Q. At that time did you associate Mr. Browder with this agent's visit and the picture that was shown you in 1929?

A. I can't state when that thought might have come into my mind. I can't state whether it was 1930, 1931 or 1932 or what particular time.

Q. You told us yesterday that when you did meet Mr. Browder you recognized that he and George Morris were the same man. Isn't that what you told us yesterday? A. Well, I don't know whether it was the first occasion that I laid eyes on Mr. Browder, that that thought came into my mind, but I recollect that it did come into my mind at some period, but I can't be sure of just when that happened.

542

Q. Well, it was about the time you first met him and recognized his physical description, isn't that so? A. Well, I am not sure, because sometimes you see a person at a mass meeting maybe a distance away. The lighting effect and all those things may not bring out the resemblance to anything you know or have seen. So I can't remember to say about that.

Q. You told us yesterday you first met Mr. Browder about 1930 or 1931? A. Approximately.

Q. You saw him at that time and saw his physical make-up, didn't you? A. Yes.

543

Q. This thing concerning this passport was coming up pretty regularly, wasn't it. Mr. Powers? A. No.

Q. Well, you signed as an identifying witness in 1927, didn't you? A. I presume I did.

Q. You were questioned concerning that application in 1929, two years later, isn't that true? A. Yes, as well as I can recollect.

Q. What is it? A. As well as I can recollect.

Q. And you met Mr. Browder about 1930, two years later? A. I am not sure whether it was 1930 or 1931.

Q. Well, there did come a time, however, when you came to the realization that Mr. Browder and Mr. Morris were

544

George E. Powers—For Government—Re-direct.

one and the same person, isn't that true? A. Well, I had an idea but I can't say that I was certain of it, but I had an idea, a thought that they may be one and the same person.

Q. You told us yesterday that there did come a time when you realized that Browder and Mr. Morris were one and the same person? A. Well, I wasn't positive of it, at least, as nearly as I could recollect, that there might be probably one.

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Q. Your recollection was pretty good, wasn't it, because you had known, according to your testimony, Mr. Morris for five years prior to 1927? A. Off and on I had met him casually.

Q. And you had occasion to see Mr. Browder frequently speak at mass meetings and other meetings in 1930 and 1931; isn't that true? A. Not so frequently. Over a period of two years you might say frequently, lumping it together. As I recollect, Browder did not speak every week or even every month where I would see him, anyway.

546

Q. Well, now, there wasn't much doubt in your mind, was there, Mr. Powers, when you saw Mr. Browder, that it was the man known to you as Morris? Was there any doubt in your mind on that point? A. Well, eventually—I thought there wasn't eventually.

Mr. Cahill: You say eventually there was no doubt?

The Witness: I would agree generally with that.

Q. When you did come to the realization that Mr. Browder was in fact Mr. Morris, did you have any conversation with Mr. Browder concerning the 1927 application? A. No.

Q. Did you ask him anything concerning your going down to the passport agency and swearing as an identifying witness? A. I have no recollection of it.

Max Bedacht—For Government—Direct.

547

Q. You didn't make any inquiry of Browder at all on that subject? A. I have no recollection of it.

Q. Well, now, did you seek out Mr. Brodsky when you came to the realization and inform him of the fact? A. I can't recollect having done so.

Q. When you came to the realization that Mr. Browder was in fact Mr. Morris, which was subsequent to your being questioned by the Government man, did you attempt to seek him out and reveal that fact to him? A. I have no recollection of it.

Q. You made no statement to any person when this realization came to you that Mr. Browder was in fact Mr. Morris? A. Well, I might have mentioned it casually to some of my associates, possibly.

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Q. Well, did you? A. I might have. I can't be sure of that.

Q. You are not sure on that point? A. No, I am not.

Q. This much is certain, that you didn't reveal it to your attorney, and you made no effort to reveal it to any Government official, isn't that true? A. As well as I can recollect.

Q. And you knew at the time that you had been questioned concerning that point, isn't that true? A. That is true.

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Mr. Dunigan: That is all.

(Short recess.)

MAX BEDACHT, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Dunigan:

Q. Do you know the defendant in this case, Earl Russell Browder? A. I do.

550

Max Bedacht—For Government—Direct.

Q. How long have you known the defendant Browder?

A. Some nineteen years or nearly twenty.

Q. You first met him about 1920? A. Yes.

Q. Have you seen the defendant frequently since you first met him in 1920? A. Quite frequently.

Q. Have you served on committees with him, and things of that sort? A. I have.

Q. What is your present occupation, Mr. Bedacht? A. I am national secretary of a fraternal benefit society.

Q. What is the name of the society? A. The International Workers' Order.

551

Q. How long have you been secretary of that organization? A. Seven years.

Q. Prior to the time when you became connected with the International Workers' Order, what was your occupation? A. I was working in the national office of the Communist Party.

Q. How long did you work in the national office of the Communist Party? A. Since 1919, except with interruptions in which I worked in district organizations.

Q. So that from 1919 up to the present time you have been connected in one way or another with the Communist Party and the International Workers' Order? A. That is true.

552

Q. In connection with your work in those organizations you had occasion to meet the defendant Browder from time to time, is that right? A. I have.

Q. Mr. Bedacht, have you ever seen the defendant Browder outside the territorial limits of the United States? A. Yes, sir, I have.

Q. And where did you see the defendant Browder the first time outside the United States? A. In Moscow.

Q. Can you give us the approximate time when you saw him in Moscow? A. In the Summer of 1921.

Q. How long were you in Moscow in the Summer of 1921? A. A number of weeks.

Max Bedacht—For Government—Direct.

553

Q. Do you know how long the defendant Browder was in Moscow in that year? A. I do not.

Q. How many times did you see him in Moscow during the period of time you were there? A. Oh, probably for a week or ten days I saw him quite frequently, maybe every day.

Q. Were you traveling on business or pleasure? A. Traveling on business.

Q. Do you know whether or not the defendant Browder was traveling on business or pleasure? A. I take it for granted he was traveling for business.

554

Mr. Battle: If your Honor please, I make the same objection to this testimony as was made to the other testimony along the same lines, that it is incompetent, immaterial and irrelevant, and not within the issues of this case. It is too remote, relates to periods back in 1921, while the charge here is for use in 1937 of a passport issued in 1934, and the last passport before that was in 1931. This long antedates all those dates and it is not in any way relevant or material; it is prejudicial, and we object on those grounds.

The Court: Well, I don't know exactly what the purpose of it is. There was no objection to the question other than the general objection which has been made previously. It has been understood that you had an objection to that character of testimony, but if there are other objections I think they should be interposed before he has an opportunity to answer the question.

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Mr. Battle: I object to the present line of testimony. I object to this particular question.

The Court: I will deny the motion for the reasons I have already given.

Mr. Battle: Exception.

556

Max Bedacht—For Government—Direct.

Q. Now, Mr. Bedacht, going back to the years 1920 and 1921. You at that period of time saw the defendant Browder frequently, did you not? Quite frequently? A. Not very frequently. I am not quite sure whether I saw him the first time in 1920 or 1921, and I didn't see him frequently then.

Q. In any event, you became acquainted with him in 1921 at least? A. I did.

557 Q. I show you this book. It is marked Government's Exhibit 4 in evidence, and direct your attention to this sheet which is a passport application in the name of Nicholas Dozenberg, and particularly call your attention to the photograph appearing on the reverse side of the sheet. Do you recognize that photograph? A. It looks like Mr. Browder.

Mr. Battle: Objection, your Honor.

The Court: Overruled.

Q. What was the answer? A. It looks like Mr. Browder.

558 Q. Would you say it was Mr. Browder at the time when this application was made, and that was in March 1921, as you knew him then? A. Well, I cannot answer that just yes—it looks as if it were Mr. Browder at the time.

Q. At the time, meaning 1921. A. Yes.

Q. And this photograph that you are looking at looks like the Browder that you knew and the Browder that you saw in Moscow in 1921, is that correct? A. Yes.

Mr. Dunigan: Before I go further, I notice, if your Honor please, that the affidavit of Martha Morris, submitted in support of the application of George Morris, was marked 16-A, and also 1-A for identification. I think 1-A should be marked out or the record read that 16-A is the same as 1-A for identification.

Max Bedacht—For Government—Direct.

559

The Court: It should be marked in evidence 16-A. There will be a note on the record as you have stated it, that 16-A is the same as 1-A for identification.

Q. Mr. Bedacht, I show you this paper. It is Government's Exhibit 16 in evidence, a passport application in the name of George Morris, and I call your attention to the photograph on the reverse side of that application. Do you recognize that photograph? A. It looks like Mr. Browder.

Q. Well, would you say that it was Mr. Browder, or is Mr. Browder as you knew him in 1927 when the application was made? A. It looks like Mr. Browder did look.

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Q. Now on Government's Exhibit 16-A you will note that it is an affidavit of birth signed by one Martha Morris; you will note at the bottom of that exhibit appears the name J. L. Perilla. Do you know a J. L. Perilla? A. Yes, I do.

Q. When did you first meet him? A. Probably '29 or '28.

Q. At the time when you met him did you know what his occupation was? A. He was working in the district office of the Communist Party in New York.

Q. When is the last time that you saw Mr. J. L. Perilla? A. I cannot recollect the time I saw him last, but it is a good many years ago.

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Q. Do you know where Mr. Perilla is now? A. I do not.

Q. Now, Mr. Bedacht, you have told us that you saw the defendant Browder in Moscow in 1921. Did you ever subsequent to 1921 again see the defendant Browder outside the territorial limits of the United States? A. In 1933.

Q. Where did you see the defendant Browder in 1933? A. In Moscow.

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Max Bedacht—For Government—Direct.

Q. How long were you in Moscow in 1933? A. Very few weeks.

Q. Do you know how long the defendant Browder was there? A. I do not.

Q. How many times did you see him in Moscow in 1933? A. During the period I was there, quite frequently.

Mr. Battle: I make the same objection to this testimony.

The Court: Overruled.

563

Mr. Battle: Exception.

Q. Going back for a moment, Mr. Bedacht, to 1921, when you say you saw the defendant Browder in Moscow, and you stated that so far as you knew he was there on business. Do you know the nature of the business? A. He was attending a congress.

Q. Will you tell the court and jury what you mean by a technical congress? A. Pardon me. I didn't say technical.

564

Mr. Battle: I object to this as incompetent, irrelevant and immaterial. In addition to the other objections, I object on the ground that it has no materiality.

The Court: How is that material, without reference to these other objections that have been made?

Mr. Dunigan: I think the point, your Honor—

The Court: I will sustain the objection to the question.

Mr. Dunigan: The point here, your Honor, and the relevancy of this particular testimony is that this witness and this defendant were both present at Moscow on the same type of business.

The Court: He has already testified to that effect. I don't think it is necessary to go into detail

Max Bedacht—For Government—Direct.

565

with respect to the character of the business that either or both of them were engaged in.

Mr. Dunigan: It is for that reason that the witness distinctly recalls the meetings in Moscow.

The Court: I will sustain the objection.

Mr. Battle: I ask that the answer so far as given be stricken.

The Court: It has not been given.

Mr. Battle: So far as given.

The Court: There was no answer given.

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Q. Mr. Bedacht, I show you this paper marked Government's Exhibit 3 for identification and call your attention to the photograph appearing on the reverse side of the document. Do you recognize that photograph?

Mr. Battle: What paper is that?

Mr. Dunigan: That is the Richards application.

Mr. Battle: I object to that, if your Honor please, as incompetent, irrelevant and immaterial, and not within the issues.

The Court: What is Exhibit 3?

Mr. Dunigan: The Richards application in 1931.

The Court: Objection overruled.

567

Mr. Battle: Exception. I may say in this regard, your Honor will recall that we do not dispute the fact that the Richards passport was issued. We concede that. For that reason, in addition to the other objections, I think the application itself would be incompetent.

The Court: No, I don't think that is so. I assume there is some issue in the case. I will overrule the objection.

Q. Do you recognize the photograph, Mr. Bedacht? A. It looks like Mr. Browder.

568

Matthew C. Earl—For Government—Direct.

Q. You will note that that paper is dated November 18, 1931. Would you say that the photograph appearing there is a photograph of Mr. Browder as you knew him at that time? A. I don't know whether I have photographic imprints in my mind of the various times.

Q. Well, would you say that the photograph appearing on that paper, Government's Exhibit 3 for identification, is a photograph of Mr. Browder? A. It looks like it.

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Mr. Dunigan: I will offer Government's Exhibit 3 for identification.

Mr. Battle: The same objection, your Honor.

The Court: The same ruling.

(Government's Exhibit 3 for identification received in evidence.) (Read to the jury.)

Mr. Dunigan: That is all, Mr. Bedacht. Thank you very much.

Mr. Battle: No questions.

Mr. Werner: Mr. Earl, please.

570

MATTHEW C. EARL, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Werner:

Q. Mr. Earl, what is your occupation? A. Agent of the State Department, at the Passport Agency in New York.

Q. Will you keep your voice up just a little more. A. I will try.

Q. Mr. Earl, how long have you been an agent in the State Department? A. Since 1927.

Q. And as an agent of the State Department, have you authority to administer oaths in connection with applications for passports? A. I have.

Matthew C. Earl—For Government—Direct.

571

Q. Approximately how many applications for passports have been executed before you, if you recall? A. Well, I can't say over the period of years, but it runs into thousands.

Q. Do you recall each and every applicant and each and every identifying witness who appeared before you? A. No, I couldn't.

Q. Do you follow the same basic procedure with respect to each and every application? A. Yes, sir.

Q. I show you the second sheet of Government's Exhibit 3 in evidence and ask you if you can state whether or not that passport application was executed before you? A. Yes, I can. 572

Mr. Battle: I make the same objection, if your Honor please, to this line of testimony as before.

The Court: The same ruling.

Mr. Battle: Respectfully except. And I will not continue to object.

The Court: Right.

Q. Now, examining the passport application, Government's Exhibit 3 in evidence, can you tell his Honor and the jury what you said to the applicant at that time and what the applicant said to you in connection with your usual practice? A. Well, I checked the application, and seeing that the photograph corresponds to the applicant appearing before me, and then I checked down the spaces on the application to see they are completely and correctly filled in. 573

Q. In this case did you check the photograph with the applicant who appeared before you? A. I did.

Q. And I call your attention to the fact that the applicant on the photograph had no mustache? A. That is right.

Q. Can you state whether or not the applicant who appeared before you had a mustache? A. I can say that the

574

Matthew C. Earle—For Government—Direct.

applicant who appeared before me resembled the photograph as here now.

Q. Can you state whether or not he had a mustache? A. He would not have had a mustache, otherwise I would not have taken his photograph.

Q. Will you proceed with the application, Mr. Earle, and tell us what else took place? A. Well, as I say, I checked down on the application, filling in spaces that were not filled in by the applicant, and asked the applicant for the correct information, such as on one space—

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Q. What did you say to him, Mr. Earle? A. Well, my customary practice, when that space is not filled in, I ask the applicant has he ever been abroad previously.

Q. And can you tell what the applicant answered in this case? A. Well, he must have given me some information that he had never been abroad before, because I wrote the word "None" in that space.

Q. In other words, the word "None" in the block provided for the question with respect to residing outside the United States is written in your handwriting? A. That is right.

576

Q. I call your attention to the fact that in the block it says, "The portion in this block to be filled in by a woman who is married to an alien and by a person whose father was not born in the United States," and that the Richards passport does not pertain to either of those classifications? A. I know that.

Q. Is it your practice in all cases to ask whether the applicant has resided outside of the United States? A. I do that on all cases regardless of whether the applicant is born abroad or here when that space is blank.

Q. And in this case the applicant told you he had never resided abroad? A. That is right.

Q. When the applicant tells you that he has never resided abroad, do you ask him whether or not he has had a previous passport? A. I customarily do.

Matthew C. Earl—For Government—Direct.

577

Q. Can you tell whether or not you did in this case? A. I usually ask both questions simultaneously, one following the other.

Q. And can you tell us from looking at Government's Exhibit 3 in evidence, what the applicant's answer to you was with respect to a previous passport? A. That he had no former passport.

Q. Now, I call your attention further to the fact, Mr. Earle, that on the left side of the second page of Government's Exhibit 3, there is a stamp "Birth certificate seen," with some initials on it. Was that stamp affixed by you?

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A. It was.

Q. And will you tell his Honor and the jury what that stamp indicates? A. Well, when a person is born in this country, they present a birth certificate or some other acknowledged and certified record of birth, and if they present a birth certificate we put the rubber stamp on the side, showing the birth certificate seen, and then whoever sees it initials it. In this case it has my initials, therefore I certified it.

Q. Can you state that the applicant in this case presented a birth certificate in the name of Albert Henry Richards, born in Oshkosh, Wisconsin, on September 4, 1895? A. I can.

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Q. Thereafter did you return the birth certificate to the applicant? A. I then returned it to the applicant.

Q. I call your further attention to the fact that the statement appears, "\$6.00 fee received." There has been testimony that the passport costs \$2.00 and there is an extra dollar for execution. Can you explain why this is \$6.00?

A. At that time, 1931, the fee was \$5.00 for the passport and \$1.00 for the execution. That had been in effect from July 1st, 1930, until it was again changed in May, 1932.

Q. I call your attention to the reverse side of the application comprised in Government's Exhibit 3 and ask you if you can state from that the date that this passport

580

Matthew C. Earle—For Government—Direct.

application was executed before you? A. Yes. It was executed November 18, 1931.

Q. And is that your signature above the line, "Agent of the Department of State"? A. It is.

Q. In both places where that signature appears it was made by you? A. It was made by me.

Q. Can you also state, Mr. Earle, who appeared at the time this application was made? Whether one or two or more appeared? A. Well, there was at least one person, the witness who signed on the oath and affidavit of identifying witness.

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Q. And the applicant himself? A. And the applicant himself. One person besides the applicant.

Q. So that at least two people appeared? A. That is right.

Q. I call your attention to the stamp, "New York Pouch" appearing on the second page of the application and ask you what that indicates? A. Well, that indicates the request of the applicant to have the passport returned to our office from Washington, or in the New York Pouch, as we call it, which is a diplomatic pouch coming to our office, and that is put on in rush cases to hurry the passport along.

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Q. And in that case the applicant or his authorized representative may pick up the passport at the local agency? A. That is right.

Q. Can you tell us in which place that application was made? A. That was made at our agency at Wall Street.

Q. Mr. Earle, when you administered the oath to the applicant, what did you say to him? A. Well, we ask, does he swear that this is his signature, and he swears to the truth of the statements in the application and he also swears the oath of allegiance to the United States.

Q. And can you tell what the applicant stated? A. Well, he must have acknowledged the three, otherwise I would not have signed it.

Matthew C. Earl—For Government—Cross.

583

Q. With respect to the word "None" in your handwriting, which we have already referred to, was that written in before the applicant took his oath, and in his presence?

A. Yes.

Q. And after the application was executed before you, what did you do? A. We then put the application aside for listing and forwarding to the Department in Washington.

Mr. Werner: Thank you.

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Cross Examination by Mr. Battle:

Q. Mr. Earle, just to make it perfectly clear, I understand that you have no independent recollection of this particular application? A. No, sir.

Q. Your testimony here is simply testimony from your custom and practice? A. That is right.

Q. You have had many thousands of applications you have testified to? A. That is right.

Q. And you are still in the Government employ? A. I am.

Q. In the same— A. In the same office.

Q. In the same office? A. Yes.

585

By Mr. Werner:

Q. Is that your invariable custom and practice? A. All the time, yes.

Mr. Werner: Mr. Bell.

The Court: Is there anything new that Mr. Bell is going to testify to with respect to this application?

Mr. Werner: Yes, sir. He is going to testify to the fact that a passport was issued and a passport was sent out to Chicago. This is his last appearance.

586

John O. Bell—For Government—Recalled, direct.

JOHN O. BELL, recalled, testified further as follows:

Mr. Battle: We have conceded the issuance of the passport itself.

Mr. Werner: There has been no concession on the record that I have heard and I think we will save time this way.

The Court: I think we will, if we are going to argue about it. I thought it might be conceded that he would testify the same with respect to this passport as he did with respect to the others.

587

Direct Examination by Mr. Werner:

Q. Mr. Bell, will you examine Government's Exhibit 3 before you—I refer to the second page of it—and state if you can, whether or not that was an application received by the Department in Washington? A. Yes, it is a passport application received by the Department.

Q. And was a passport issued on that application? A. Passport No. 451933, was issued on November 19, 1931.

Q. And will you explain the markings to his Honor and the jury? A. Well, the passport number in the upper right hand corner, the stamp indicating the issuance of the passport on that date.

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The Court: Isn't that exactly the same testimony as he gave with respect to the others?

The Witness: Yes.

The Court: And are you going to say the same thing with respect to this one?

The Witness: Yes.

The Court: Isn't that enough?

Mr. Werner: That is enough for the application.

Mr. Battle: I ask that this testimony also be taken under the same objection as the previous testimony.

John O. Bell—For Government—Recalled, direct.

The Court: Yes. The same ruling.

Mr. Battle: Exception.

Mr. Werner: And we should further like the stipulation that the passport was sent to the New York agency in the pouch of the State Department on November 19, 1931.

Mr. Battle: We make no question that the witness will so testify.

(Paper marked Government's Exhibit 20 for identification.)

Mr. Werner: I ask that Exhibit 20 be marked in evidence. 590

(Government's Exhibit 20 for identification received in evidence.)

Mr. Werner: And that this sending via pouch is indicated by Exhibit 20 in evidence, and further that the passport was never returned to the Department in Washington, as is the fact if the applicant or an authorized representative does not call for it at the agency. Do you so stipulate?

Mr. Battle: We don't question that the witness will so testify.

Q. Now, will you look at the first page of Government's Exhibit 3 in evidence and state, if you will, what that is? 591

A. This is the application for the renewal of the passport issued on the application, which is the second page, indicating that the passport was issued, was renewed in the Chicago passport agency on November 9, 1933, to be valid until November 19, 1935.

Q. Now I show you Government's Exhibit 2 in evidence, passport application in the name of Earl Russell Browder, and Government's Exhibit 6 in evidence, a renewal application for passport in the name of Earl Russell Browder, and ask you if you can state whether or not there were outstanding and valid at the same time passports in the

592

John O. Bell—For Government—Recalled, direct.

name of Richards issued upon the passport application and renewal in that name and a passport in the name of Earl Russell Browder issued on the passport application in that name, all of which applications are in evidence?

Mr. Battle: We object to the question as incompetent—the witness's opinion on that. They speak for themselves, whatever it is.

The Court: The regulation is in evidence, is it not?

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Mr. Werner: Not yet, your Honor. That is going in evidence.

The Court: It will be put in, of course. I think the Court might take judicial notice that it is not. I will overrule the objection and give you an exception.

Mr. Battle: Exception.

Q. Will you answer the question? A. The files indicate that at the time there were valid passports in each of these names in existence at the same time.

594

Q. Will you state for what period of time both those passports were outstanding and valid? A. The passport in the name of Richards was valid from November 19, 1931, until November 19, 1933, and since it was renewed on November 9, 1933, it was valid until November 19, 1935.

The passport in the name of Browder was valid from September 1st, 1934, until September 1st, 1936, and was renewed in February, 1937, which made it valid for a further period of two years.

The Court: Until what date?

The Witness: September 1st, 1936—1938 I mean.

The Court: 1938?

The Witness: 1938.

John O. Bell—For Government—Recalled, direct.

595

By Mr. Werner:

Q. So that from the period from September, 1934, until November, 1935, both passports were outstanding and valid? A. That is correct.

Q. Now I call your attention to a statement in the passport application, Government's Exhibit 2 in evidence, in which the applicant states "None," after the words "My last passport was obtained from" and I further call your attention to the stamp, "Passport issued" on the Browder application, Government's Exhibit 2. Would the Department issue a passport to an individual if they knew at the same time that that individual had presently an outstanding valid passport in another name?

596

Mr. Battle: I object to that, if your Honor please, as highly incompetent, immaterial and prejudicial.

The Court: I will permit that question. The answer is perfectly obvious.

A. No.

Mr. Battle: Your Honor overrules the objection?

The Court: Yes.

Mr. Battle: I except.

597

A. (Continuing) The Government would not issue a passport to a man who had an outstanding valid passport. It is contrary to regulations. •

(Papers marked Government's Exhibits 21 to 25, inclusive, for identification.)

Q. I show you Government's Exhibits 21 to 25, inclusive, for identification and ask you if they are copies of the regulations with respect to the issuance of passports? A. They are.

598

John O. Bell—For Government—Recalled, direct.

Mr. Werner: I offer them in evidence.

(Discussion between Mr. Werner and Mr. Battle.)

Q. Mr. Bell, Mr. Battle wants to know which of these regulations were in force in 1934 and 1937? A. The exhibit number 23 is a copy of the regulations that were in force during the period June 22, 1932, until March 31, 1938, except as amended by the amending Executive Order which is certified in Exhibit 24.

599

Mr. Battle: Those two, Exhibits 23 and 24, are those the ones that were in effect from 1932?

The Witness: They were in effect from 1932 on up to March, 1938.

Mr. Battle: We concede, of course, that these rules existed, and we don't make any question about the authenticity of the document here, and we have no objection to Exhibits 23 and 24, which relate to the period here, because that is what we are charged with here, for the use of the passport issued in 1934 and renewed in 1937. The others we object to on the ground of their not having any relevancy, incompetent, irrelevant and immaterial, and because they relate to passports issued on applications made prior to August 31, 1934.

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The Court: Objection overruled for the reason already given.

Mr. Battle: Exception.

Mr. Werner: I offer Government's Exhibits 21, 22, 23 and 24.

(Government's Exhibits 21 to 25, inclusive, received in evidence.)

Mr. Werner: Thank you, Mr. Bell.

Mr. Battle: No questions.

Walter G. Blackburn—For Government—Direct.

601

WALTER G. BLACKBURN, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Werner:

Q. Mr. Blackburn, what is your occupation? A. I am a special agent of the Federal Bureau of Investigation.

Q. How long have you been such? A. About five and a half years.

Q. And what is the nature of your work? A. I work in the technical laboratory in the Federal Bureau of Investigation at Washington, in the examination of handwriting, typewriting and other documentary examinations.

602

Q. Of what college or university are you a graduate? And with what degree? A. I graduated from Cornell University in 1919 with the degree of Bachelor of Chemistry.

Q. Have you also engaged in additional studies to fit yourself for your work? A. I have.

Q. And what are those? A. I have studied textbooks of recognized authors on the subject of questioned documents. I have attended lectures of various handwriting experts, such as Dr. Wilmer Souder of the Bureau of Standards, and Mr. C. A. Appel of our own Bureau.

603

Q. In connection with your work in the technical laboratories approximately how many handwriting specimens have you examined? Can you state? A. Well, I couldn't very well estimate that. I have examined well over 4,500 different cases involving many thousands of specimens of handwriting.

Q. Have you ever previously qualified as an expert on questioned documents and handwriting in courts of law?

A. I have.

Q. In this district? A. Yes, sir.

Q. And others? A. Yes, sir.

Q. I show you Government's Exhibit 4 in evidence, passport application in the name of Nicholas Dozenberg; Gov-

604

Walter G. Blackburn—For Government—Direct.

ernment's Exhibit 16 in evidence, passport application in the name of George Morris, with an affidavit—

Mr. Battle: If your Honor please, I object to any testimony in regard to the Dozenberg or Morris applications on the same ground as has been stated before.

The Court: Objection overruled.

Mr. Battle: I except.

605

Q. —and Government's Exhibit 2 in evidence, passport application in the name of Earl Russell Browder, and I ask you where and when you first saw them, and under what circumstances? A. These were submitted to me by the State Department on June 23, 1939, for handwriting examination.

Q. I show you furthermore Government's Exhibit 3 in evidence, passport application in the name of Albert Henry Richards, and ask you if that was submitted to you for examination? A. It was.

Mr. Battle: Also object to the application in the Richards' case.

606

The Court: Overruled.

Mr. Battle: Except.

Q. Have you prepared enlargements, Mr. Blackburn, of the Richards, Morris and Dozenberg applications referred to in evidence? A. I have.

Q. And have you those with you? A. I have.

Mr. Battle: If your Honor please, in order to save time, we will concede that this witness will testify that certain pieces of handwriting on which the District Attorney was questioning him are all in the same handwriting, and that he will testify in his

Walter G. Blackburn—For Government—Direct.

607

opinion that it is in the handwriting of the defendant Browder.

Mr. Werner: We won't accept such concession.

Mr. Battle: I thought I would save time.

(Photographic enlargements marked Government's Exhibits 26 for identification to 41 for identification.)

Q. Mr. Blackburn, is Government's Exhibit 26 for identification an enlargement of the first side of Government's Exhibit 2 in evidence?

608

Mr. Battle: Pardon me a minute. If it please the Court, I wish to object in advance to each one of these enlargements upon the same grounds upon which I objected to the documents of which these are enlargements.

The Court: That is, of course, understood.

Mr. Battle: And I ask for an exception. I also object further on the ground that all this paraphernalia of enlarged documents before the jury is entirely unnecessary because we are willing to concede that this witness will testify that the handwriting, which the District Attorney is about to question him on, is all in one handwriting, and in the handwriting of Mr. Browder, which I assume is all he can be called upon to testify to.

609

The Court: I think the government is entitled to put in its proof in its own way. I overrule the objection.

Mr. Battle: Exception.

A. Government's Exhibit 26 is a photographic enlargement of one side of the passport application of Earl Russell Browder.

Q. Of Government's Exhibit 2. A. Pardon me; Government's Exhibit 2.

610

Walter G. Blackburn—For Government—Direct.

Q. And is Government's Exhibit 27 for identification a photographic enlargement of the reverse side of Government's Exhibit 2 in evidence? A. It is.

Mr. Battle: I don't believe it is necessary for me to renew my objection each time.

The Court: Certainly not. You have an exception.

Mr. Battle: Exception.

611

Q. Is Government's Exhibit 28 for identification a photographic enlargement of Government's Exhibit 14 in evidence? A. It is.

Q. And is the same true as to Government's Exhibit 29 for identification? A. With the difference that that photograph was made with a filter to partially remove the red stamp so the handwriting characteristics could be better seen.

Q. And is Government's Exhibit 30 for identification a photographic enlargement of Government's Exhibit 11 in evidence? A. It is.

Q. And is Government's Exhibit 31 for identification a photographic enlargement of Government's Exhibit 12 in evidence? A. It is.

612

Q. Is Government's Exhibit 41 for identification a photographic enlargement of the signature Nicholas Dozenberg appearing in two places on Government's Exhibit 13 in evidence? A. It is.

Q. Is Government's Exhibit 32 for identification a photographic enlargement of certain lines appearing on Government's Exhibit 2 in evidence, Government's Exhibit 3 in evidence, Government's Exhibit 16 in evidence, and Government's Exhibit 4 in evidence? A. It is.

Q. Is Government's Exhibit 33 for identification a photographic enlargement of a page of Government's Exhibit 3 in evidence? A. It is.

Walter G. Blackburn—For Government—Direct.

613

Q. Is Government's Exhibit 34 for identification a photographic enlargement of a page of Government's Exhibit 3 in evidence? A. It is.

Q. Is Government's Exhibit 35 for identification a photographic enlargement of a page of Government's Exhibit 16 in evidence? A. It is.

Q. Is Government's Exhibit 36 for identification a photographic enlargement of a page of Government's Exhibit 4 in evidence? A. It is.

Q. With the exception of this piece of paper which was pasted in front of the application when you took your photograph? A. It is.

614

Mr. Werner: I refer to the words "Please forward passport in New York pouch Saturday night," appearing on Government's Exhibit 36 for identification.

Q. Is Government's Exhibit 37 for identification a photographic enlargement of a page of Government's Exhibit 4 in evidence? A. It is.

Q. Is Government's Exhibit 38 for identification a photographic enlargement of a page of Government's Exhibit 3 in evidence? A. It is.

615

Q. Is Government's Exhibit 39 for identification a photographic enlargement of a page of Government's Exhibit 16 in evidence? A. It is.

Q. Is Government's Exhibit 40 for identification a photographic enlargement of a page of Government's Exhibit 3 in evidence? A. It is.

Mr. Werner: I offer in evidence Government's Exhibits 26 to 41 for identification.

Mr. Battle: Same objection.

The Court: Same ruling.

Mr. Battle: Exception.

616

Walter J. Blackburn—For Government—Direct.

(Government's Exhibits 26 to 41 for identification received in evidence.)

617

Q. Now, Mr. Blackburn, have you compared the handwriting on a passport application and renewal in the name of Richards, Government's Exhibit 3, and a passport application in the name of Morris, Government's Exhibit 16 in evidence, and a passport application in the name of Nicholas Dozenberg, Government's Exhibit 4 in evidence, with a view towards ascertaining and reaching an opinion as to whether or not they were all written by the same individual? A. I have.

Q. And have you reached an opinion? A. I have.

Q. And what is that opinion? A. They were all written by the same individual.

Q. Now, will you state to the jury your reasons for that opinion? A. I think I can point them out from these enlargements.

(Recess until 2:15 P. M.)

618

(Afternoon session.)

WALTER J. BLACKBURN, resumed the stand.

By Mr. Werner:

Q. Mr. Blackburn, you have already testified that in your opinion the passport application in the name of Morris, Government's Exhibit 16; the passport application in the name of Richards, Government's Exhibit 3, the passport application in the name of Dozenberg, Government's Exhibit 4, were all written by the same individual. Will you explain to the jury and his Honor your reasons for that opinion. A. On the enlargements we have here I have

Walter J. Blackburn—For Government—Direct.

619

marked with some red crayon certain of the characteristics which I took into consideration in my examination of the handwriting on these three applications. Take, for example, Government's Exhibit 36. The words "New York": there are several particularly characteristic things about those two words. The first is the manner in which the word "New" and the word "York" are connected together from the small letter "w" to the capital letter "Y"; the second being the relation between the capital letter "N" and the capital letter "W". In this instance it is written, as you will notice, with the capital letter "N" considerably taller than the capital letter "Y". Another characteristic in the writing is the manner in which the small letter "k" is formed at the end of the word "York". We find that the staff of the letter "k" is not made with a loop, but with a retracing stroke, which when it reaches the bottom of the letter then reverses its direction, and the final portion of the letter is made by a counter-clockwise curved stroke. That form of the small letter "k" is also apparent in the word "Stockholm" in the same exhibit. Here is another instance in the same exhibit where the words "New York" are written, and you will notice that the "w" is connected to the "Y"; the "Y" is considerably shorter than the capital letter "N", and the "k" is made in that manner in which I mentioned a moment ago. There are certain other characteristics, in which the figure "8", the manner in which that figure is written. The figure "8" here is written by the starting at the top of the stroke, making a double curvature, and instead of ending the stroke in an upward direction, it is curved back over to the left. That is, it starts at the left, making the figure and curves back over to the left, completely closing up the top loop on the figure "8". We find also certain other characteristics in this writing such as the small letter "c" which is made with the loop not very well closed; that is the "c" is made by the stroke coming forward and slant-

620

621

622

Walter J. Blackburn—For Government—Direct.

ing to the right and retracing that to join with the next letter. In the small letter "o" we find in making the "o" it is finished with a small almost horizontal loop at the top of the letter. The first stroke in the "o" comes up more or less vertically. The "o" is finished by going back over to the left, with that vertical loop completing the "o". It is a little more apparent in the small letter "o" in the word "Dozenberg."

623

On the second page of that application which is designated as Exhibit 37 we find some of the same characteristics, such as the figure "8" in which the figure starts at the top, making the "8" and then curving back over to the left to complete the figure. We find certain other characteristics such as trailing off of the stroke after the final letter in a word, such as in the word "medium" and in the end of the word "none" and the word "spare". We find also the small letter "n" is made in a very open fashion; that is, the retraced stroke is not a retracing, but it is an opening, forming a sort of a "V" formation, that characteristic occurring in nearly every instance in which it is written. Take Government's Exhibit 35 which is the first page of the application of George Morris: We find

624

here again the words "New York" in which the "w" is connected to the "Y" in the same characteristic manner in which it was connected in the previous exhibit that I mentioned. We find also that the "Y" is again shorter than the capital letter "N", and the small letter "k" at the end of the word "York" is made with the same motion. In the figures "1891", here again we find that figure "8" formed in the same manner in which it was formed on Exhibits 36 and 37. We find the small letter "o" likewise made in the same fashion, with the first stroke coming to the top of the letter and then the letter being completed with that small horizontal loop going over to the left to complete the letter before connecting with the second. Here it is again in the word "Christopher" and in the word

Walter J. Blackburn—For Government—Direct.

625

"Morris" up on the first line. We find in the word "none" the small letter "o" made in the same characteristic manner, and likewise even the small letter "n" made with the very open portion there appearing as a "V". We find the long trailing stroke at the end of the writing, such as in the word "none", in the word "Lawrence". Certain other characteristics appear here. In the capital letter "E" the "E" ends with a small loop at the bottom of the letter before connecting with the next letter in sequence. That also appears on Government's Exhibit No. 36 in the word "Estonia". We find that after the "E" is made there is that small loop at the bottom of the letter, which is characteristic of this particular writing. On Government's Exhibit 39 which is the second page of the George Morris application we again find this characteristic appearance, such as the figure "8", the words "New York", with the "w" connected in the same characteristic manner, with the "Y" considerably shorter than the letter "n", and the letter "k" again made in the same manner. We find these characteristics appearing twice on this page.

626

On Exhibit No. 40, which is the first page of the Richards application, here again we find similar writing characteristics appearing such as here in the figure "8". We find in the word "none" the letters all made in the same characteristic manner. We find the "n" made in that open fashion, as I explained a moment ago. We also find the ending of the "n" trailing off in a long ending stroke, such as in the word "none" there. In the word "Oshkosh", and the word "Richards" on the third line.

627

Q. Mr. Blackburn, with respect to the word "none" written a line or two above that, was that written in the same handwriting? A. No, that is not in the same handwriting. That is in another handwriting.

On Exhibit 38, which is the second page of the Richards application, here we find the words "New York" again written with the same characteristic connection between

628

Walter J. Blackburn—For Government—Direct.

the letter "W" and the capital letter "Y". Also we find again the "Y" is considerably lower than the capital letter "N", although in this instance a printed letter "N" has been used. We find in this word "none" the same characteristics appearing as before, with the "o" made by finishing it with that horizontal loop. In this case there is a closed loop at the top of the letter; and the letter "n" made with the open formation such as a "V". We also find these trailing endings such as with the word "none", where the "e" trails off to the right. We find that same condition here in the word "Brown". We find it in the

629

signature Richards. One of the characteristics I mentioned earlier about the small letter "e": you find that occurring in all these writings here. In the word "Musician" it occurs in similar fashion to the other applications.

Q. Mr. Blackburn, are you mentioning every single characteristic of the handwriting? A. I am not attempting to do so. I mean, it would probably take too long or be too boring to do so. I am pointing out characteristics which occur throughout these writings; not all of them, but some of them, upon which I base my opinion when making the examination.

630

Q. Have you also examined the originals under microscope? A. The examinations were all made from the originals. On Exhibit No. 33, which is the second page of the Richards renewal application, we find these characteristics again appearing. In the words "New York", it is again written with the same characteristic connection between the "w" and the "Y"; also the "Y" being considerably lower, shorter than the capital letter "N". The final "k" is written in similar manner. There are also other characteristics in those writings, such as the small letter "r", the capital letter "R". These and other characteristics which I may not have mentioned assisted me in reaching the conclusion that these were all written by the same individual.

Walter J. Blackburn—For Government—Direct.

631

Q. Now, Mr. Blackburn, have you also examined the signature on the petition for naturalization in the name of Nicholas Dozenberg, and on the naturalization certificate in the name of Nicholas Dozenberg, Exhibits 13 and 14, in evidence, respectively, with a view towards ascertaining whether the handwriting is in the same handwriting as on the Dozenberg passport application, Government's Exhibit 4 in evidence? A. I have.

Q. And have you reached a conclusion as to whether or not they were both written by the same individual? A. I reached the conclusion that they were written by different individuals.

632

Q. Will you tell his Honor and the jury the reasons for your opinion? A. We have on Government's Exhibit 36 two instances where the name Nicholas Dozenberg appeared. We have on Government's Exhibit 41 two signatures of Nicholas Dozenberg which appear on the petition for naturalization and on Government's Exhibit 29 the signature which appears on the duplicate naturalization certificate.

I have marked a certain point of difference occurring between these signatures appearing on Government's Exhibit 36 and those on Exhibits 41 and 29. I may say that there is a difference practically throughout the entire writing. The first difference is in the capital letter "N". On Exhibit 41 you will notice that the stroke starts on the base line of writing, here on the dotted line, it goes upward to the left, coming down, forming a sharp angle at the bottom. The stroke stops and goes to the right, and retraces, ending somewhat below the base line of writing. That occurs likewise in the second signature appearing on Exhibit 41.

633

On Exhibit 29 the beginning stroke of the capital letter "N" begins considerably to the right. In fact, it begins to the right of the second letter of the word, the small letter "i". It goes upward to the left forming a loop,

634

Walter J. Blackburn—For Government—Direct.

dragging back to the base line of writing at a sharp angle and again going up to the right forming the letter "n" which in this case is connected to the small letter "i" by an elongated curve below the base line of writing.

In the signatures as appearing on Government's Exhibit 36 you will notice that the loop does not start at the base line of writing in the first instance, whereas it does in the second. And in the first instance it starts about half way up the letter forming a very wide loop. Likewise, a very wide loop is formed in the second signature, much wider than the loop appearing in Exhibit 29.

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After forming the letter the ending stroke of the capital letter "N" on Exhibit 36 forms a loop which curves upward to the left before connecting it up with a small horizontal stroke to the small letter "i", which is quite contrary and quite different from the manner in which the "N" connects with the small letter "i" on Exhibit 29.

We find the small letter "c" in Exhibit 29 is disconnected from the stroke ending the small letter "i". The stroke ends, the pen is lifted, and a large loop is placed to commence the small letter "c". That forms the "c" in more or less of a usual manner with the exception that it has a very large initial loop.

636

You notice in the signatures on Exhibit 36 there is no loop appearing in the small letter "s". The letter "H" in Exhibit 29 is formed in a very open fashion—what we know as a counter-clockwise type of writing; that is, the letter is not formed by the usual method of retracing the staff of the letter to form the hump of the letter "h". That does, however, occur in Exhibit 36 where there is a definite hump on the letter "h".

The small letter "o", you recall the characteristic I mentioned in the small letter "o" on Exhibit 36 was that it had a horizontal loop at the top of the letter. The small letter "o" on Exhibit 29 does not have a horizontal loop. It is a small vertical loop, and the letter is left open at

Walter J. Blackburn—For Government—Direct.

637

the top, the difference being entirely a different writing motion forming that letter.

The small letter "a" and the connection between the small letter "l" and the small letter "a" is entirely different and is quite contrary to the same characteristic in Exhibit 36. In Exhibit 36 in the upper signature you will note that the pen has been lifted and the small letter "a" formed in a more or less conventional manner. In the second signature the small letter "l" has been connected to it in the more or less conventional manner.

The signature on Exhibit 29, you notice that the stroke of the "l" comes below the letter "a" and very faintly traces right up through the right side of that letter forming its loop and then dropping immediately to the base line to form the letter "s" following. That is entirely different writing motion than employed on Exhibit 36.

638

I could point out each and every characteristic on there, but some of the others which perhaps are most significant are the small letter "n", which is written in Exhibit 29 to give the appearance of a small letter "a" and not an "n", which is what we call a counter-clockwise writing; whereas in Exhibit 36 it is written in just the reverse manner.

639

The small letter "b" in Exhibit 29 is formed with the large vertical loop, but ends with a small vertical loop. Whereas in Government's Exhibit 36 you will notice that the small letter "e" ends with not a vertical loop but almost a perfectly round loop at the conclusion of the letter before it is connected with the small letter "e".

Those were some of the characteristics which lead me to the opinion that the two are not written by the same person.

Q. Mr. Blackburn, would you state in your opinion that the words "Nicholas Dozenberg" on Government's Exhibit 36 in evidence, the enlargement of the passport application, was written in pictorial simulation of the signature

640

Walter J. Blackburn—For Government—Direct.

"Nicholas Dozenberg" on Government's Exhibits 29 and 41 in evidence? A. There is more pictorial similarity to the signature on Exhibit 29 than there is to the signature on Exhibit 41. I pointed out, for instance, the capital letter "N" on Exhibit 29, which somewhat approximates the shape of the capital letter "N" on Exhibit 36, but it still differs from it. There is a general pictorial similarity to certain of the letters occurring in these two writings. The final letter "g", for instance, is somewhat pictorially like the final letter "g" in the signature on Exhibit 29, and yet when you get down into handwriting characteristics themselves the similarity does not exist.

641

Q. Is such a pictorial similarity in your experience usually the result of an attempt to duplicate a signature by one who is not familiar with handwriting characteristics?

A. It is what would be expected.

Mr. Werner: At this time, your Honor, I would like to read Government's Exhibit 18 to the jury, which is a stipulation with respect to the handwriting on the passport application in the name of Earl Russell Browder.

642

The Court: All right.

(Mr. Werner read Government's Exhibit 18 to the jury.)

Q. Mr. Blackburn, have you also compared the writing on the baggage declarations Government's Exhibits 11 and 12 in evidence with the passport application in the name of Earl Russell Browder, which is conceded in certain parts to have been written by him, with a view towards ascertaining whether or not the writing on the baggage declarations referred to were written by Earl Russell Browder? A. I have.

Q. And have you reached an opinion? A. I have.

Q. And what is that opinion? A. They were written by the same individual.

Walter J. Blackburn—For Government—Direct.

643

Q. Will you state the reasons for your opinion, Mr. Blackburn? A. I have confined my marking of the baggage declarations to the signature Earl Browder appearing on Exhibit 30 and the signature Earl R. Browder appearing on Exhibit 31. Making a comparison of the signature Earl Browder on Exhibit 30 with the writing Earl Russell Browder on Exhibit 26, you find that the first characteristic, the capital letter "E" appearing on Exhibit 30 is written in a similar fashion to that on Exhibit 26. The letter "E" begins at the base line of writing, the stroke coming upward to the right to the top of the letter, at which point the direction changes and the two horizontal loops of the capital letter "E" are formed.

644

Again we find the characteristic which I mentioned before, that is, the loop at the ending of the letter such as appears in each instance on each of these exhibits.

Another characteristic in the signature Earl Browder on Exhibit 30 is the small letter "r".

And the third characteristic is the small letter "l". Notice that in this instance the small letter "l" is written very small, hardly larger than the "r" and about the same size as the small letter "a".

On that signature on Exhibit 26 you will notice that the small letter "l" is written very small with respect to the rest of the writing although here it is slightly larger than the "a" and the "r".

645

The signature appearing on Exhibit 27 you will notice that the "a" and the "l" are approximately the same size.

In the word "Browder" the capital letter "B" is formed in the same fashion as the capital letter "B" on Exhibits 26 and 27. Here the small letter "r" is connected to the capital letter "B" by means of a loop at the end of the capital letter "B".

The "o" contains that characteristic which I mentioned earlier with the horizontal loop at the top of the letter.

646

Walter J. Blackburn—For Government—Direct.

The small letter "w" you will notice is written with the center portion of the "w" not coming as high as the extremes of the letter. Here we find that characteristic again appearing.

The final letter "r" is made similarly with the same motion in each instance.

On Exhibit 31 we find the same characteristic appearing in the word "Earl" where the small letter "l" is approximately the same size as the small letter "a" and the "r" is written considerably smaller than the small letter "a".

647

The capital letter "R" in Exhibit 31 is similar in all respects to the capital letter "R" in Exhibit 27. We find again the small letter "r" connected in the same fashion and the small letter "r" at the end of the word likewise formed in the same manner.

This leads me to the conclusion that the two are by the same writer.

Q. Mr. Blackburn, have you also compared the standard in the admitted handwriting of Earl Russell Browder, the defendant, Government's Exhibit 2, the passport application in his name with the passport applications in the names of Richards, Morris and Dozenberg? A. I have.

648

Q. And you have previously testified that it was your opinion that the passport applications and renewals in the names of Richards, Morris, and Dozenberg, were written by the same individual, have you not? A. That is right.

Q. Now, have you reached an opinion as to whether that individual was the defendant on trial here? A. The opinion reached is that those three applications in the names of Morris, Dozenberg, and Richards, and the renewal application in the name of Richards, were written by the same individual that wrote the Browder passport. Exhibit 2, is it?

Q. Yes. Will you tell his Honor and the jury the reasons for that opinion, Mr. Blackburn? A. Go back to some

Walter J. Blackburn—For Government—Direct.

649

of the characteristics which I pointed out in connection with the three passport applications. You will recall that one of the characteristics or several of the characteristics I pointed out occurred in the writing of the words "New York" such as on Exhibit 36 with the "w" connected to the "Y", the "Y" lower than the "N" in the characteristic manner. We find on the Browder application, Exhibit 26, that same characteristic occurring. We find the "w" connected to the "Y" and the "Y" considerably lower than the capital letter "N". The final letter "k" is made in the same fashion.

650

Take the small letter "c" which I pointed out in the writings in which we find them being written in exactly the same manner in Exhibit 26 in, for instance, the word "Wichita", and in the word "Wallace".

Likewise, on Exhibit 26, you will notice that the second "New York" appearing is written in a similar manner to the first and similar to those on Exhibits 36, 35, and 8.

Take the characteristics in the word "None" in Exhibit 26. Here we find that the small letter "o" made in the same characteristic fashion with the letter ending with that horizontal loop at the top of the letter, this small letter "n" written in the very open fashion giving the appearance of a letter "V".

651

In the application in the name of George Morris I call your attention to the writing of the word "Morris" where it appears in several places on the first line and again on the third line as compared with the word "Morrell" where the first four letters are common to both words. In writing that combination first we find the capital letter "M" made similarly, that is, the first loop of the letter is very large. The second loop is very small. Here we find in the word "May" the first loop is very large and the second loop is very small. Also in the word "Morris". It is not quite so apparent in the first word "Morris" written there.

652

Walter J. Blackburn—For Government—Direct.

You will also find this characteristic of the beginning stroke in certain capital letters like "M" and "N" where it starts low down and goes up to the top of the letter before forming the letter.

We find that same characteristic in the word "May" and in the word "Morrell".

The figure "8", which I pointed out in the previous applications, is written in the same fashion in Exhibit 26 whereby the top of the letter is closed up with the ending stroke finishing off to the left.

653

Here we find the capital letter "E" ending with that small loop at the bottom of the letter as I mentioned before.

In Exhibit 40 I call your attention to the word "Six" and to the word "Six" appearing in Government's Exhibit 26. In each instance the word is written in the same fashion and the same peculiar formation of the "x" is written in each instance whereby the crossing of the letter "x" is much more horizontal than normally written and is evidently characteristic with the writer.

654

We find the use of this type of capital letter "S" in Exhibit 27 where the letter is written in the fashion of an enlarged small letter "s" with not the extra loop at the top of the letter. That type of "S" appears in these other applications—in the Morris application, for instance, in the abbreviation for the word "Street", which is on Government's Exhibit 35; and on Exhibit 39 in the word "Scar". You will also find that same characteristic in the applications in the name of Dozenberg in the word "Stockholm", and I believe it also occurs on the second page on Exhibit 37 in the word "Stein".

As a rather graphic illustration of how certain of these characteristics such as appear in the word "None" follow out throughout the four applications, I have prepared enlargements of those words appearing in the four applications. You will notice that in each instance the characteristic of the small letter "n" and the "o", the "e",

Walter J. Blackburn—For Government—Cross.

655

the trailing off of the letter, elongated in most instances of the right, appearing similarly in all respects each time it is written.

Here we have of course a capital letter in certain instances which is not comparable with a small letter, the two words "None" as written in the Browder application, Exhibits 26 and 27, and you will notice that he has two ways of starting the small letter, "n" in the word "none". Sometimes it starts at the top and sometimes it starts low down, bringing it up to the top before forming the letter. Here in the Richards' application we find that same thing occurring. In one instance it starts at the top and in the other instance it starts low down. Even though these are capital letters in the Morris' application, we find the same occurs. They start high in one instance and low in the other. In the Dozenberg application, two instances, while one is a capital letter, the letter starts at the top; whereas in the other instance it starts at the bottom.

656

Mr. Werner: You may cross-examine.

Cross Examination by Mr. Battle:

Q. Mr. Blackburn, you are connected with the Federal Bureau of Investigation? A. Yes, sir.

657

Q. And what is your position there? A. I am a special agent, sir.

Q. You are regularly employed there? A. Yes, sir.

Q. You have no other employment? A. No, sir.

Q. You are a salaried employee? A. Yes, sir.

Q. And when were you first requested to take up this matter about which you have been testifying? A. This particular case?

Q. Yes. A. These specimens were first—

Q. When were you first consulted about the case itself? How long ago? A. I believe it was on the 23rd of June.

Walter J. Blackburn—For Government—Cross.

Q. 23rd of last June? A. That is right, sir.

Q. You began your work on the case about that time?

A. Yes, sir.

Q. When did you begin making these enlargements? A. Not until I knew I was to be called upon for testimony.

Q. And when was that? A. I can't recall exactly, sir.

Q. Give us your best recollection? About when was it?

A. Oh, it was probably in October or November.

Q. Of last year? A. I don't recall exactly.

Q. How many enlargements have you made here? A. I believe there are 19 or 20.

Q. Altogether? A. I believe so.

Q. And what are their dimensions? A. 40 by 60, the large size.

Q. How long have you been working on those? A. I don't understand quite your question.

Q. How long have you been working in preparing these enlargements? A. It took probably a day or so to prepare.

Q. And how long ago was that done? A. That was done about two weeks ago.

Q. How long have you been devoting your time exclusively to this case? A. In total? I couldn't answer that.

Q. How long have you been devoting your time exclusively to this case? A. I couldn't answer that.

Q. Can you give me your best recollection? A. I would have no way of judging that at the moment.

Q. Three months? A. Not consecutively, no.

Q. You said you were consulted first in June. A. That is right.

Q. And you began making these enlargements about October or November, didn't you? A. Yes.

Q. Well, can you tell us about how many months you have devoted to this work?

Mr. Cahill: If your Honor please, the question, of course, the witness finds himself unable to answer

John O. Bell—For Government—Recalled, cross.

661

because it assumes that at one time he was exclusively devoting his time to this work. If counsel is going to stress the word "exclusively" I submit he should lay a foundation.

Mr. Battle: My last question did not contain the element of exclusiveness.

Q. I am asking you how much time you have devoted to this work according to your best judgment? A. I couldn't answer that because I have worked on it at different times and I have no way of totalling up the total amount of time.

662

Q. The Federal Bureau of Investigation I see from that heading is a Bureau of the United States Department of Justice? A. That is right.

Q. That is a department of which the Attorney General is the head? A. That is right.

Q. And Mr. Cahill is a part of that department? A. I believe so.

Mr. Battle: That is all.

Mr. Werner: Thank you very much.

Mr. Cahill: The government rests.

Mr. Battle: There are a few questions I would like to ask Mr. Bell.

663

JOHN O. BELL, recalled.

Cross Examination by Mr. Battle:

Q. You recall that when you were testifying yesterday I questioned you about an application for a passport made by Mr. Browder in September, 1938, and his Honor made a statement that he thought enough had been put in the

664

John O. Bell—For Government—Recalled, cross.

case to establish the fact that an application was made at that time.

The Court: That is not quite my recollection. I made some kind of statement and asked you if it was not enough, and it is my recollection that you said it was.

Mr. Battle: That is correct, as to the application.

Q. Now, I am going to ask you if there was a passport
665 issued.

Mr. Cahill: I object to that as immaterial.

The Court: Sustained.

Q. Was a passport issued on that application?

Mr. Cahill: I object to that.

The Court: I sustain the objection and give you an exception.

Mr. Cahill: Thank you, Mr. Bell.

The Court: We will take a recess until Monday morning at half past ten in this room.

666

(Adjourned to Monday, January 21, 1940, at 10:30 A. M.)

New York, January 22, 1940,
10:30 o'clock, A. M.

(Trial resumed.)

(Conference at the bench between Court and counsel.)

The Foreman of the Jury: Your Honor, one of the jurors got one of these cards (handing postcard to Court).

Motions to Strike Out Certain Exhibits.

667

The Court: I also got a similar card. I don't think there is any use in paying much attention to it. I am much obliged to you for calling it to my attention.

(Further conference at the bench.)

Mr. Battle: I have some motions.

The Court: Do you want to excuse the jury?

Mr. Battle: Yes.

The Court: Well, before that you better rest, then.

Mr. Battle: The defense rests, if your Honor please, and I have a number of motions I would like to make. It will take some little time.

668

The Court: I will excuse the jury, then, until after the motions. You might wait in the jury room. (Jury retired from the courtroom.)

Mr. Battle: If your Honor please, before formally closing, I should like to offer on the cross examination of Mr. Bell the passport that was issued in 1938.

The Court: I will make the same ruling with respect to that as I formerly made.

Mr. Battle: May I have that marked for identification, your Honor?

669

The Court: Yes.

Mr. Battle: Take exception.

Mr. Cahill: That is the application?

Mr. Battle: The passport itself.

May I ask, if your Honor please, that these motions be considered as being made technically at the close of the case for the Government and then repeated after the defense rests.

The first motion is this, if your Honor please: there was offered by the prosecution several pamphlets containing different rules and regulations promulgated by the President and by the Secretary

670

Motions to Strike Out Certain Exhibits.

of State. They were, as I recall, Government's Exhibits 21, 22, 23, 24 and 25. I would move to strike out from those exhibits those rules and regulations promulgated by the Secretary of State. The different pamphlets contain rules and regulations promulgated by the President and also by the Secretary of State. We claim that the Secretary of State had no power, that the power to make rules and regulations in this regard was not delegated to him, and that he had no power to make those rules and regulations; and therefore we ask that they be stricken out.

671

The Court: I don't know what particular rules you refer to.

Mr. Battle: Take first Exhibit 21; that is Executive Order No. 7856. I don't believe that contains any rules and regulations promulgated by the Secretary of State. Yes, this does. Government's Exhibit 21 does contain Department Order No. 749 by the Secretary of State regarding passports and applications for passports, which is part of Government's Exhibit 21.

672

The Court: What does it provide in so far as any issue in this case is concerned?

Mr. Battle: Well, there are several rules, several pages of rules, in regard to the surrender of old passports, transmission of passports to applicants, period of the validity of passports, authorization of clerks of courts to retain fees, return of passport fees. I think the material parts here are in regard to the surrender of old passports and the transmission of passports to applicants. And our contention is that that is not a matter which could be delegated to the Secretary of State.

The Court: I still don't quite understand how any of those rules which you have specifically re-

Motions to Strike Out Certain Testimony.

673

ferred to has any particular relevancy so far as this case is concerned. However, I will deny the motion and give you an exception.

Mr. Battle: Give me an exception.

May I consider the same motion made as to others, and I will specify on the record just what they are.

Taking Exhibit 22, Departmental Order No. 433-A, pages 12 to 16; inclusive, they are orders made by the Secretary of State, Frank B. Kellogg, when he was Secretary.

Then Exhibit 23, Departmental Order No. 538, it being an order made by the Secretary of State regarding passports and applications for passports under Henry L. Stimson.

674

Exhibit 25, Departmental Order 538, pages 15 to 19. That I think is the same order, and I ask that all of those orders and rules purporting to be promulgated by the Secretary of State, to which I referred, I make a separate motion as to each one, and take exception to your Honor's ruling.

And Mr. Bell, on question at page 191 of the minutes, testified concerning the question of having two passports at the same time. Later on he testified that the Department would not issue two valid passports at the same time. I took objection to that, and exception was taken, and I would like to move to strike out his previous testimony along that same line.

675

The Court: Denied.

Mr. Battle: Exception.

Now, if your Honor please, I beg to repeat and renew the motion made at the beginning of the case, that the Court declare that all evidence relating to the Morris and Dozenberg applications and passports be considered illegal and incompetent, and be excluded; and I now make that same motion coupled

676

Motions to Dismiss Indictment and Acquit the Defendant.

with a motion to strike out all testimony relating to those applications and to those passports, on the grounds stated in that motion.

The Court: Denied.

Mr. Battle: Exception.

I renew the motion, if your Honor please, on the ground that the use set forth in the indictment, the use of the passport set forth in the indictment, is not the use contemplated in the statute, Section 220.

677

.In addition to the previous grounds, I move to dismiss on the ground that the Government has failed to prove that the defendant used a passport to gain entry into the United States in 1937 and 1938. It clearly appears from the testimony of George German, Immigration Inspector (pages 213-217), that it is his duty to examine all persons who are aboard the boat which is in the New York Port "to determine whether or not they are citizens, and if they are aliens, to determine their admissibility."

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When a passport is presented to an inspector by an American citizen, it is not for the purpose of gaining entry, but merely to establish his citizenship. The right of a citizen to enter is not determined by the inspector at the port. The right of a citizen to enter exists regardless of passports, birth certificates, or any other forms of identification. An American citizen can enter the United States without any form of identification providing his citizenship is known.

The Inspector of Immigration only exercises his judgment concerning the admissibility of the person involved where that person is an alien. Therefore when the passport was presented to him by the defendant it was only for the purpose of establishing his citizenship, and not to convince him that he should permit the defendant to enter the United

Motions to Dismiss Indictment and Acquit the Defendant.

679

States. This is further indicated by the statement of the inspector to the effect that citizens are not compelled to present passports to establish their citizenship, but can use birth certificates, naturalization certificates or any other means of identification.

We submit, therefore, that it is clear that the defendant did not use a passport to gain and secure entry into the United States, that it was not a proper passport use. For that reason we move to dismiss the indictment and for the acquittal of the defendant.

680

Now we renew the motion to dismiss the indictment and for an acquittal on the ground that the indictment does not set forth with sufficient certainty or definiteness any statement upon which an allegation of falsity can be predicated. We make that motion on the same ground as the motion to that same effect which was made at the beginning of the case, and we now renew it as being made at the close of the case for the Government and the case for the defense.

The Court: Denied.

Mr. Battle: We renew the motion made at the beginning of the case for the Government on the ground that there was no criminal intent. In this respect I move to dismiss on the ground that the Government has failed to prove that the defendant wilfully and knowingly used the passport to gain and secure entry into the United States. The Government has failed to prove that the defendant had a criminal intent at the time that he presented the passport to the immigration inspector in 1937 and 1938. The Government has failed to prove that the defendant knew that the passport which he obtained was so obtained by reason of false statements, that he knew he needed a passport to gain entry into

681

682

Motions to Dismiss Indictment and Acquit the Defendant.

the United States, that he intended to and did use his passport for the purpose of entering the United States, knowing that it was unlawful for him to do so.

The law presumes that a citizen knows the law, and so it must be presumed that the defendant knew that he did not need a passport to enter the United States. Thus it cannot be supposed that the defendant would have presented a passport if he knew that such was not necessary and if he knew that his passport was a bad one. It must be clear that the defendant had no criminal intention at the time he showed his passport to the immigration inspector. For a man who was bent on a criminal act, his conduct was amazingly open and fair.

683

The Government's case is fatally defective in that it lacks the most essential ingredient of the entire case, namely, the criminal intent of the defendant at the time of the alleged act. There is no proof that there was a knowing and wilful use to gain entry.

The Court: Denied.

684

Mr. Battle: I make the same motion to dismiss the indictment and for the acquittal of the defendant on the ground that it appears by the indictment and subsequently by the evidence which has been offered, that the renewal of the Browder passport of 1934 was in effect an application for a new passport; that in the application for the renewal it appears that the reference to the original passport and to the application on which it was granted was stricken out; so that on the application for renewal, it was a new application for a new passport, and in that new application there is no reference to previous passports, and therefore no allegation of any false statement.

Motions to Dismiss Indictment and Acquit the Defendant.

685

I also call your Honor's attention to the following considerations: I move to dismiss on the ground that the passport which the defendant is charged with having used in 1937 and 1938 was not issued to him by reason of any false statement made by him. It appears from the testimony of Elma V. Waldron, agent of the Department of State, at pages 159-170 of the record, that the passport originally issued to the defendant expired on September 1, 1936, thereby losing all force and effect; that a renewal application was executed by the defendant on February 2, 1937, and that there were no false statements made therein; no statements alleged to be false made therein; that the passport was renewed without reference to the old application, and as a matter of fact, neither the original application, the original passport, nor the renewal application was submitted to the Department of State for them to determine whether the renewal passport shall be granted; and that although the application form contained a statement to the effect that the application and passport were submitted for the Department's consideration, in the renewal application executed by the defendant, Mr. Browder, such statement was deleted by Mr. Waldron, by drawing a line through it.

686

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It is clear and it cannot be disputed that the passport which the defendant allegedly used in 1937 and 1938 was a new passport and in fact a passport which had been issued by reason of the application executed in 1936, and not because of the application executed in 1934.

On that ground I move to dismiss the indictment and for the acquittal of the defendant.

The Court: Denied.

688

Motions to Strike Out Certain Testimony and Exhibits.

Mr. Battle: Now, to those motions, if your Honor please, I would ask that there be added the following motions relating to evidence, as to the Morris and Dozenberg applications and passports: that the evidence constitutes attempted proof of other offenses; on that ground in addition to the other grounds, I move to strike out the evidence.

The Court: Denied.

689

Mr. Battle: I except. Now then, if your Honor please, I make the following motions for the striking out of testimony. I move to strike out the testimony offered and the exhibits introduced by the Government concerning Dozenberg's passport on the following grounds: (1) that they tend—that is the testimony and the exhibits—tend to charge and prove separate and distinct offenses barred by the Statute of Limitations; (2) that they are too remote to have any value of a probative nature whatsoever; (3) that they are highly prejudicial and thereby deprive this defendant of an opportunity for a fair trial, and violative of his constitutional rights; (4) that they are not admissible under the rules of evidence, nor do they fall within the exceptions of any of the decisions which permit the introduction of proof of other offenses; (5) that they are not within the issues raised by the indictment and have no relation whatsoever to the crime for which the defendant is now on trial.

690

The Court: Denied.

Mr. Battle: Exception. I also move, if your Honor please, to strike out the testimony offered and the exhibits introduced by the Government concerning the Morris passport on the following grounds: (1) that they tend to charge and prove separate and distinct offenses barred by the Statute of Limitations; (2) that they are too remote to have

Motions to Strike Out Certain Testimony and Exhibits.

691

any value of a probative nature whatsoever; (3) that they are highly prejudicial and therefore deprive this defendant of an opportunity for a fair trial, and violative of his constitutional rights; (4) that they are not admissible under the rules of evidence, nor do they fall within the exceptions of any of the decisions which permit the introduction of proof of other offenses; (5) that they are not within the issues raised by the indictment and have no relation whatsoever to the crime for which the defendant is now on trial. On those grounds I move to dismiss and for an acquittal.

692

The Court: Denied.

Mr. Battle: Then, if your Honor please, I move to strike out all the exhibits and the testimony offered in connection with the Richards application, as the issue before this Court was the one raised in the indictment and based on the alleged false statement "None" occurring in the blank after the words "My last passport was obtained from". The issue therefore before this Court is whether or not this defendant obtained a last passport. The obtention of this passport is the crux here, the issue, and it is not the application itself, or any other proof leading up to the obtaining of the passport. For the purpose of this case there would be no difference in point of law as to whether the last passport was obtained in the name of Richards or Browder. The question was, did the defendant obtain a last passport? In this case, particularly in view of the fact that the defendant conceded that he had obtained a last passport, the proof which the Government introduced directed to the manner in which such last passport was obtained was highly prejudicial. In view of that fact the defendant moves to strike out all the testimony leading up to

693

694

Motions to Dismiss Indictment and Acquit the Defendant.

the obtaining of the Richards passport on the same grounds assigned to the previous motions with respect to the Dozenberg and Morris passports.

The Court: Denied.

695

Mr. Battle: I further move, may it please the Court, to dismiss the indictment and for the acquittal of the defendant on the ground that the indictment is vague, indefinite and does not apprise this defendant of the nature of the charge with which he was to be confronted at this trial, and is therefore violative of his constitutional rights. In this connection the indictment charges that he had made a false application for passport No. 145182 on or about August 3, 1934, under the name of Earl Russell Browder, "which said passport thereafter was renewed at a passport agency of the Department of State at New York City, New York, on or about February 2, 1937." The Court will take judicial notice with reference to the laws regulating the issuance and the renewal of passports, which provide that a passport can be renewed only upon the making of a separate and distinct application for that purpose. In view of the fact that the indictment charges necessarily the making of two applications, and refers to false statements contained in only one, it is the contention of the defendant that the allegations with respect to falsity in the first application, in light of the fact that the use to which the passport has been made was predicated upon a passport which came into being by virtue of the second application, could therefore not be violative of Section 220 of Title 22, of the United States Code. The pleading in this respect is vague, uncertain and indefinite, and the defendant is therefore deprived of his constitutional rights.

696

The Court: Denied.

Motions to Dismiss Indictment and Acquit the Defendant.

697

Mr. Battle: Exception. I further move, if it please the Court, to dismiss the indictment on the ground that a holding by this Court in construing Section 220 of Title 22, United States Code, to the effect that a presentation of a passport by a native born American, who is a citizen of the United States, for the purpose of entering the United States, would be violative of his constitutional rights, and the construction of the statute in that light would be insofar as this defendant is concerned, and the use to which he is alleged to have put the passport in issue, violative of his constitutional rights.

698

The Court: Denied.

Mr. Battle: Exception. I move to dismiss the indictment and for the acquittal of the defendant on this ground, that since the statement on the application beginning "My last passport was obtained from" and ending "for cancelation" is clearly susceptible of the meaning that the defendant had no passport for cancellation at the time of his application in 1934. The Government's failure to establish that the defendant had such a passport at that time requires the dismissal of the indictment.

699

The Court: Denied.

Mr. Battle: I further move to dismiss on the ground that the Government has failed to establish that it was induced to issue the passport by reason of the alleged false word "None". On the contrary, it has been established by the Government's own witnesses that the Government had been put on notice at least ten years ago, in 1929, as to the previous action of the defendant with relation to passports, so that when it issued the passport in 1934 the Government was presumed to have knowledge, if it did not have actual knowledge, and the passport was not issued by reason of the word "None".

700

Motions to Dismiss Indictment and Acquit the Defendant.

The Court: Denied.

701

Mr. Battle: Exception. I now move to dismiss the indictment and for the acquittal of the defendant on the ground there is no proof that the defendant was in possession of a passport when he made the application for a passport on August 31, 1934; that certainly at the time of the renewal on February 2, 1937, no other passport was outstanding; and furthermore, there is nothing in the statute or the rules of the President promulgated thereunder which proscribes the simultaneous existence of two passports; that it appears from the evidence that when the defendant used his passports in 1937 and in 1938, that was the only passport outstanding in his name or possession, so that it must be found as a matter of law that the defendant did not make use of any false passport wilfully and knowingly on those occasions.

The Court: Denied.

702

Mr. Battle: I make the same motion for the same relief upon the ground that the indictment for an otherwise perfectly legitimate alleged passport use, solely because the passport was allegedly secured by reason of an allegedly false statement, is barred by the statute of limitations where, as in this case, the making of the allegedly false statement and the securing of the passport occurred beyond the period of limitation.

The Court: Denied.

Mr. Battle: In that connection I renew, if your Honor please, the motion made at the opening of the case for the dismissal of the indictment and for the acquittal of the defendant on the ground that the offense is barred by the statute of limitations.

The Court: Denied.

Mr. Battle: Exception.

Motions to Dismiss Indictment and Acquit the Defendant.

703.

I further make the same motion, if your Honor please, on the ground that Section 220 of Title 22 of the United States Code applies only to aliens or persons not owing allegiance to the United States. The defendant here is concededly a native born citizen and does not come within its provisions.

The Court: What section are you referring to?

Mr. Battle: Section 220. It is the section under which the indictment is drawn. Our contention is that that relates only to passports issued to aliens, passports which are issued to persons who have no right to them, aliens or persons who have no allegiance to the Government.

704

The Court: Well, I am afraid I don't quite follow you on that. I had supposed that a passport could only be issued to a citizen.

Mr. Battle: That is what I say. The prohibition there is against passports being issued to aliens or applications for passports being issued to aliens. If your Honor will recall the language of that section, it applies to passports which are contrary to the laws regulating the issuance of passports, or to rules promulgated pursuant to those laws. Our contention is that that clause in that section clearly indicates and shows that it relates only to applications for passports to aliens; if a man makes an application claiming to be a citizen when he is not.

705

The Court: I understand. I will deny your motion.

Mr. Battle: Exception. And I make the same motion on the ground that the prosecution of the offense insofar as it is based upon proof of previous alleged crime, in obtaining passports in the names of others, if stricken from the record, there is left insufficient evidence of the defendant's guilt.

The Court: Denied.

706

Summation by Defendant.

Mr. Battle: Except. I move to dismiss and for an acquittal on the ground that there is no law or rule authorized by law which required the defendant to state whether or not a previous passport had ever been issued to him, nor is there any law or rule authorized by law which required the defendant to submit the passport for cancellation.

The Court: Denied.

707

Mr. Battle: Exception. Then I move to dismiss the indictment and for the acquittal of the defendant on the ground that the evidence produced here by the Government is insufficient for submission to the jury on the question as to whether any offense was committed under this indictment.

The Court: Denied.

Mr. Battle: Exception. Your Honor will give me an exception to each ruling?

The Court: Certainly.

Mr. Battle: This is the passport of 1938. I would like to have it marked for identification.

(Passport No. 583689 marked Defendant's Exhibit A for identification.)

708

(The jury returned to the Courtroom.)

The Court: I understand that the defendant wants to sum up his own case?

Mr. Battle: Yes. He prefers to sum up the case himself. I made that application to your Honor and your Honor has granted it.

The Court: I will permit him to do so, but I think he should understand that he has to confine himself to the evidence in this case.

(The defendant, Earl Russell Browder, summed up the case to the jury in his own behalf as follows:)

Mr. Browder: Your Honor, and Ladies and Gentlemen of the Jury: My request of the Court that I be permitted to sum up this case was in no

Summation by Defendant.

sense a judgment that I am a better lawyer or advocate than my distinguished counsel, Mr. Battle, and I want to say just in the beginning a word of appreciation for what I consider the most able, the most excellent handling of this case on my behalf by my chief counsel especially, and by his associates. I think he has done about all that could have been done to make the real issues appear out of the mass of evidence that has been presented.

My own qualifications to argue this case are that I am intimately familiar with the facts and that I have had a little training at law myself, holding a degree in law. True, it is a degree obtained from a correspondence school. 710

Mr. Cahill: If your Honor please, I don't like to interrupt at the outset, but it should be plain that matters not in the record should not be referred to.

The Court: That is quite correct.

Mr. Cahill: Your Honor, I don't like to interrupt, but at the outset we should make it plain that matters not in the record should not be referred to.

Mr. Browder: I think the first question that is probably in the minds of the jury is the question, Why didn't the defendant take the stand. 711

Mr. Cahill: That I will object to, your Honor.

The Court: Objection sustained.

Mr. Browder: I will not discuss it, therefore, if there is objection, although I am quite ready to discuss that question if it is a question which needs to be answered. But if it is understood and agreed that that question does not and cannot play any role in the minds of a single juror in arriving at any decision, I am quite content to leave it there.

In discussing the evidence my arguments are, of course, subject to correction by you as to the facts.

712

Summation by Defendant.

Your memory is quite clear on these considerations on the facts and evidence, and in my argument I am only relying on my own memory, as refreshed by reference to the minutes.

713

It is my belief that the real issues in this case have been obscured by a mask of irrelevant or trivial details, that in order to find the real issues we must first of all understand what are not the issues. There is no charge that the false passports upon which I am being tried in this case—there is no charge for which I am being tried here for the use of other names on passports. There is no charge that I have in any way secured rights that I am not entitled to, that any persons have been injured by any action of mine, nor has it been shown that any damage has flowed, directly or indirectly, from the acts upon which the two counts of the indictment are predicated. I am on trial for having entered the Port of New York with my own passport under my own name in the full light of the publicity of the New York press, of the newspaper reporters present, photographers flashing their bulbs and taking pictures, crowds gathered to see every detail of that entry. This is the crime. In so far as the evidence presented upon the indictment places the issues, in so far as the issues are not to be inferred from the situation in the world and in this country outside of this courtroom, outside of the evidence presented here, such issues must be explicitly delimited.

714

The basic ones are: are there any facts or circumstances connected with the entry described in the evidence when I came into the Port of New York on April 30, 1937, and on February 15, 1938, with my own passport in my own name—is there any evidence which can transform those two entirely

Summation by Defendant.

715

normal and matter of fact events into crimes against the peace and dignity of the United States? That is the sole issue. If at any time in our argument it should seem to you that I am relying upon technicalities, I ask you to remember that the prosecution itself has presented a case compounded of technicalities. It is a thin web of technicalities, and everything of seeming substance in the case consists of matter which on its own merits would be excluded from consideration, but is brought in only on technicalities, and in facing a technical prosecution it is necessary to make a technical defense as well as a substantive one of law and evidence.

716

Just to remind you from the language of the indictment itself that this is the sole issue—the two entries—the indictment says in two counts, “did use and attempt to use Passport No.” so and so, “in the name of Earl Russell Browder.”

The second count in the indictment says “did use and attempt to use this passport for the purpose of gaining and securing admission into the United States; against the peace of the United States and their dignity and contrary to the form of the statute”.

717

Now let us review the facts of those entries. That is the starting point. We can very well start our argument with this. These facts are simple. Extraordinarily simple.

On the 30th of April, 1937, I entered the harbor of New York on the steamship Berengaria. I presented my passport to the Immigration Inspector as evidence that I was no alien. I presented a Customs declaration on the dock, cleared my baggage, and proceeded to my home and family.

On the 15th day of February, 1938, I similarly entered the Port of New York, on the steamship

718

Summation by Defendant.

Aquitania, again presented my passport to the Immigration Inspector again presented a Customs declaration, and again rejoined my family.

These two incidents are the alleged crimes. Without these there could not even be a pretense of any prosecution on any of the evidence brought before you.

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Now let us put these two events under a microscope, so to speak, somewhat in the manner that our scientific witness with samples of handwriting the other day, although this time to try to determine something at issue in the case. These two acts of entrance have been described in the evidence with a wealth of detail that leaves very little to the imagination. We may analyze them from every angle and try to identify, to localize, to put our finger on them, on those features or aspects of the two acts of entry which might conceivably transform them into crimes, crimes that would call into action the great machinery of justice.

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First, perhaps, I, the defendant, whose entry is the subject of examination, perhaps I was not entitled to enter the Port of New York. Perhaps I was not entitled to enter the territory of the United States. Perhaps my right of entry was questionable. Perhaps that was the subject of possible dispute. No, that is not the case. Mr. Cahill himself on behalf of the prosecution has signed a stipulation that is in the evidence, setting forth that I am and always have been a native born citizen of the United States. As a citizen I had a right to enter the Port of New York or any other port. That right was an absolute one, an unchallengeable one. It could not be abridged or limited by any authority. The manner of defendant's exercise might be regulated by measures of public order, but only in so far as

Summation by Defendant.

721

the absolute right to enter was not thereby infringed upon. In the act of entry, therefore, as an exercise of an absolute right, there is not and there cannot be the slightest taint of illegality. There is no such thing in law as the illegal entry of an American citizen into the United States. There is no such thing in law. And I am sure his Honor will so charge you before you deliberate upon this issue. There is no such thing as the illegal entry of a citizen. In those voluminous records, the ship's manifests that were introduced in evidence by the prosecution to prove beyond all doubt that I did in truth enter the United States, you can find interesting indications of this absolute right of citizens to enter the United States. Citizens are carefully listed separate from aliens. On the bottom of the list is clipped a warning in big black type which you will see when you examine those manifests, not to unduly delay the debarkation of citizens. Lists of aliens are accompanied by certificates of the examination by health officials that those named are not suffering from any specific diseases. But no such certificate is applied to citizens. Why? Because even if citizens suffered from the bubonic plague they could under no circumstances be excluded or denied entrance.

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The Immigration inspectors who have testified here, and testified very clearly and honestly, have each explained what is one of the essential points of the defense—that their only business with citizens is to distinguish them from the aliens, because it is only with the aliens that they have any business to transact. It is only with the aliens that the Immigration inspectors are concerned. If the act of entry is itself impermeable to any taint of illegality, was there any incident or feature of these particular

Summation by Defendant.

acts of entry which could be taken separately from the entry itself and shown to be illegal? Was it not the entry that was illegal, but some act in connection with the entry which was illegal? Look over the records. The Customs declarations are in evidence. Anything wrong there? Nobody pretends there was. Was there anything in fact secretive or hidden about the entries? Was anything concealed from these entries? Nothing whatever. On the contrary, evidence introduced by the prosecution has shown that these entries were highly publicized, newspaper reporters were gathered because of this entry, photographers were there to take pictures of this entry. They recorded everything, or sufficient to impress the events so clearly upon the minds of case-hardened port officials so that they clearly remember the details 19 and 32 months later. Surely a great deal of attention was concentrated upon the entrances at the time they took place. The prosecution has found nothing in the circumstances of the entries to single out, except this one thing, that the defendant did display his passport issued in his own name before the Immigration inspector as evidence of his citizenship, as evidence of the fact that the inspector had no business to transact with him, that he did not come within the category of persons whom the inspector was authorized to examine, to determine whether entry could be permitted or not?

By what theory can it be urged that this display of my passport in my own name to an Immigration inspector furnished the body of a crime, regardless of any question concerning the origin of the passport, to which we will come later? Did this display of a passport, to use the language of the indictment again, secure entry and admission into the United

Summation by Defendant.

727

States for me? It did not. The Immigration inspector under no circumstances had the slightest authority to exclude me from entry, and the display of my passport merely informed the inspector that I was a person with whom he could not interfere, that his authority did not extend to me; and that information being correct, that information corresponding to the true situation, absolutely nothing had taken place which could be tainted in any way by anything that might have happened at any other time or place. I received nothing from the inspector of Immigration except the recognition that if he interfered with me he would be violating the law. I did not receive the right to enter from the inspector, for he held no rights and had no way to regulate those rights. I did not receive the entry from the passport; I received it from my status as a citizen, which is unchallenged here.

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Summing up the evidence on the specific acts named in the indictment, without which there is nothing to consider, namely, the entry into the United States on April 30, 1937 and February 15, 1938, with all the surrounding circumstances, including the presentation and display of the passport before the Immigration inspector, we must conclude that there is no wrongdoing, there is no deception, there is no fraud, there is no obtention of any right that could have been denied by anyone by any exercise of discretion, no taint of illegality of any kind can be found in those two acts, no inference or imputation of illegality can be drawn from any other acts at any other time and place. Therefore there can be no crime found to be committed by me on those days from the evidence presented here, or any evidence that could be presented.

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Summation by Defendant.

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Now if this basic proposition is established, that there can be no crime inferred from or predicated upon the act of entry of a citizen into his country, then the whole indictment and the evidence presented upon it falls; and that fact could be proved by citing a thousand legal decisions, it could be proven by citing the everyday evidence of men who go in and out of United States territory, by fishermen who go out beyond the three-mile limit to fish and come back. They don't have to have any special papers to re-enter. It can be proven by pleasure boats going in and out. No papers are necessary. They leave and enter the territory of the United States, and every one of such acts of leaving and entering is of exactly the same legal significance as leaving and entering with an ocean liner from Europe.

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If this is established, no further argument is necessary. The verdict of acquittal must automatically follow. If that proposition is rejected, if it is maintained that there are circumstances under which a citizen could be excluded, could be exiled from his country, then it becomes necessary to follow up our argument further to the next link in the chain of evidence, a long, complicated, flimsy thing, upon which the Government relies to link 1937 and 1938 with events in the past, in many instances the dim past.

This next link, when we go behind events of the two entries charged in the indictment, is the document displayed on the entries, that passport that was issued in 1934. Was it the passport issued in 1934 that was presented in 1937 and 1938? The prosecution has insisted that it was. But the prosecution itself has given the evidence that it was not. The

Summation by Defendant.

733

evidence shows conclusively that the passport issued in 1934, issued to me in my own name, had become null and void, had expired, its validity had expired—

Mr. Cahill: I must object to this, because it seems clear that the defendant is arguing upon the law, which is for the Court.

The Court: That of course is true, Mr. Browder.

Mr. Browder: I would submit, your Honor, that this is not only a point of law, but a point of evidence which is properly a subject for the consideration of the jury.

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The Court: With all due respect to you, Mr. Browder, I am inclined to disagree with you. I think those questions of law, insofar as they are applicable to the case, have already been determined. Therefore you will confine yourself to the record in the case.

Mr. Browder: Yes, I am arguing on the evidence as presented.

The Court: I understand. All right.

Mr. Browder: That passport had the potentiality of being renewed. In fact it was renewed, as the evidence has clearly shown. It was renewed on February 2, 1937. It was renewed, as the evidence shows, upon the basis of a new application, the payment of a new fee, and in the new application it is not and has not been contended by the prosecution that there was any false statement.

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You have had that application before you. You have seen it. You can refresh your memory. That evidence shows that the renewal was made without reference to the original application of 1934. And this evidence you can very properly weigh and consider. In fact, the application for the renewal, you will find when you look it over, had a form on it—

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Summation by Defendant.

printed form—which anticipated that the renewal would specifically renew not only the passport but the original application together with the passport. But you will also see when you examine it that that form which anticipated such a thing was not used; it was stricken out from that form, and the act of striking it out was the act of a Government agent and not my act. This evidence presented by the prosecution itself contains the proof. If you will examine it you can test it yourself by looking at the document and comparing that document with the evidence that was presented; that the Government's agents themselves specifically excluded, by their own act, the renewal of the application, together with the renewal of the passport.

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The prosecution relies upon the theory that because this passport contains the same proof as 1934 and that it is composed of the same physical body, that therefore it is the same document with exactly the same attributes and connotations as the original. But determine whether that is so or not—

Mr. Cahill: Here again I must interrupt.

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Mr. Browder: That is a question of law, but it is also a question of fact to be presented by the evidence.

Mr. Cahill: I press my objection that the question is one of law and that the Court has ruled.

The Court: I think that is so, Mr. Browder.

Mr. Browder: I think, your Honor, that it is competent to discuss the evidence presented by the prosecution to determine as a matter of fact whether this evidence indicates that the renewal created a new document, or whether the renewal merely extended an old document. I think that is not only a question of law; this is also a question of fact. The prosecution has accepted it as a question of fact by

Summation by Defendant.

739

presenting evidence on it in this case, and I think that therefore we must discuss this evidence before the jury.

The Court: I am afraid I don't agree with you.

Mr. Browder: Do I understand then that you request me not to continue my arguments on this point?

The Court: I would rather not put it that way. I can say that I think you should confine yourself to the record in this case, leaving the questions of law to the Court.

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Mr. Browder: Exactly what I thought I was doing, your Honor.

The Court: If the Court has determined those questions of law improperly, you have your remedy in another forum.

Mr. Browder: Of course, if at any time it is understood, ladies and gentlemen of the jury, that if I make any statement about the law, I do it with the understanding that you don't take the law from me. You take it from his Honor. I am not trying to lay down the law to you; I am trying to argue the significance of the evidence. And of course the significance of the evidence always has to be considered in the light of one's interpretation of the law. If I should argue wrongly, I think Mr. Cahill will have ample opportunity to refute me.

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Mr. Cahill: Not on the law.

Mr. Browder: And I am arguing on the evidence, and I maintain, if I may be permitted to sum this case so there won't be any more useless argument about it—

Mr. Cahill: I object to that. This is the third time—

The Court: I didn't want to get into any argument about it, though. It seems to me that this case

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Summation by Defendant.

should be summed up by the defendant and by the District Attorney on the evidence in the case. That is all I can say at this time. I don't want to have any argument between the defendant and the Court, and between the District Attorney and the Court, except it is absolutely necessary, which I don't think it is.

Mr. Browder: I agree entirely with your Honor, and I have at all times.

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The Court: Suppose you continue with your argument before the jury.

Mr. Browder: It is my contention that the evidence presented in the renewal application constitutes evidence of a break in the chain of the prosecution's argument. The law aspects of that you will get from the Court. You will take from me only, for whatever it may be worth, the arguments on the weight of the evidence.

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If it is found by the jury, despite the evidence under the law, that the documents presented in 1937 and 1938 were in truth the selfsame document issued in 1934, that will bring us back to another link further removed from the acts charged in the indictment, that is, to the application upon which the passport was issued.

As to the passport itself, there is no contention that it was illegally issued, or that it misrepresented the true status of the defendant. It was a passport in my own name, setting forth my status unquestioned in its form and content. It is to the application that the prosecution has gone with the claim that the passport itself was tainted by the false statement in the application, that false statement being the word "None" written into a blank following the printed words "My last passport was obtained from", although the phrase cited is not a

Summation by Defendant.

745

question, and even if it were a question, the word "None" is not an answer to it as it stands in any event. As the prosecution contends, this meaningless series of words is susceptible of the meaning that it is a statement that the defendant had never before had any passport, that it was therefore false, and that such falsity induced the issuance of the passport.

If in your consideration of the case you must go as far back as the 1934 application, because you have rejected the other considerations, you will then be faced with the decision in judging the 1934 application, whether that statement "None" was a statement—that word "None" was a statement—whether it was false, and whether such falsity induced the issuance of the passport. The indictment, and the prosecution in presenting its case, has studiedly, systematically omitted all reference to the fact that the phrase "My last passport was obtained from" was only half a sentence. The other half, which was the phrase "and is submitted herewith for cancellation". It is highly significant that the prosecution suppressed the other half of the sentence in the indictment, has studiedly omitted reference to it in the presentation of the evidence. Why? The prosecution must have felt that a full citation of the sentence would weaken or even destroy the case; and that is the fact. When half presented, as in the indictment, that sentence is either meaningless or false. You can take your choice. But you have no other. Meaningless or false. But when the whole sentence is presented, you have three choices—meaningless, false or true. It is impossible to construe it as true when only half the sentence is cited, and that is why the prosecution cited only half of the sentence. But when the whole sentence is cited

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Summation by Defendant.

it is possible to construe it as a true statement and such construction would correspond to the obvious character of the statement on its face. Among the three possible interpretations when you cite the whole sentence, the interpretation that the answer "None" meant "I do not have any present passport to present for cancelation as I have destroyed it," that is the possible interpretation when you take it in the context of the full sentence. That interpretation is excluded from your consideration when you are given only part of the sentence.

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But even assuming, as will be strenuously argued—as must be strenuously argued by the prosecution, because this is the point upon which their whole case must be established, or completely fall—the prosecution's case hangs upon this completely. The defense case does not. But the prosecution's case stands or falls on this one point, and they must argue, therefore, the more strained and less obvious interpretation of that sentence.

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Assuming that you agree with the prosecution, there is yet no competent proof that such an answer deceived the Government, and therefore induced the issuance of the passport which otherwise would not have been issued. For that answer to have deceived the Government it must be shown that the Government otherwise had no knowledge of the previous issuance of any passport to the defendant. If the Government had knowledge it could not be deceived by such an ambiguous statement, and that the statement is ambiguous is unquestioned. To make it false it must be interpreted. I think even the prosecution only contends that it is susceptible of the interpretation that it is false, not that it is false on its face.

The evidence presented here has conclusively and unquestionably proved that the Government did

Summation by Defendant.

751

have knowledge of previous passport issuance when it issued the 1934 passport, and that such knowledge was officially noted on a document presented by a prosecution witness in evidence here, the notation "Recorded in Fraud File as Suspect, 12-2-29", signed "Wright".

This was further confirmed by the prosecution's witnesses, although it is highly significant that these facts were not presented by the prosecution until they had been brought out on the following day by the very able cross-examination by Mr. Battle. But the re-direct examination of these witnesses further confirmed this fact and established it beyond all question. It was not refuted, not denied. It was assumed to be a fact by the prosecution itself in the re-direct examination of that shifty, forgetful witness Powers, brought forward by the prosecution as its own witness. There is no room for the slightest doubt that the Government had knowledge of the previous passport issuance prior to the 1934 application, that it had not considered the question serious enough to warrant prosecution, that it dropped the matter, that therefore it did not consider it serious enough to warrant the denial of a passport in 1934.

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This assumption is given additional weight by further facts that the 1934 passport, after expiration in 1936, was renewed by the Government on February 2, 1937, after it had more than two years additional time to check up and consider the question whether such a passport should properly be issued. In the fall of 1937 the Government extended the privilege of a passport by an amendment endorsed thereon personally by the chief of the Passport Division to include Spain, which it heretofore and specifically excluded from the document. In September, 1938, the chief of the Passport Division

754

Summation by Defendant.

personally received the application for another passport, issued it to myself, and the offices of the State Department in Washington, as Mr. Bell, I think it was—

The Court: I think you are going a little bit beyond the record, Mr. Browder.

Mr. Browder: May I ask exactly how? I thought I had stuck very close to the record, your Honor.

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The Court: I don't think I need to remind you of the fact that the evidence with respect to that particular passport, to my recollection, has been excluded.

Mr. Browder: I was referring to the testimony of Mr. Bell, which was received, your Honor.

The Court: I may have misunderstood you then.

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Mr. Browder: I was referring to the testimony of the Government's expert witness, Bell, who, having no knowledge of this case or any particular facts concerning this case, did have knowledge of some circumstances concerning events which followed the acts charged in the indictment, which he placed into the record on the questioning of the prosecution. We were not able to bring out these things in their full implications because of objections, as you witnessed. But I again refer to the testimony of the witness Bell, and ask you to interpret that in the same sense as these other facts that I have just cited. I can't give you the exhibit in evidence for you to examine, but you have a right to infer that such evidence does exist, if it is necessary.

Every one of those three acts of renewal, extension and issuance of the passport privileges to me after 1934, two of which were made directly through the Chief of the Passport Division in Washington to me in person, these are additional proof, if proof is needed, that prior passports were no bar to the

Summation by Defendant.

757

issuance of the 1934 passport itself, for if it was a bar in 1934, it was equally a bar in 1937 and 1938. Even this accumulation of overwhelming proof, proof that the Government had prior knowledge that it did not consider the matter of sufficient seriousness to warrant prosecution when the supposed offense was alive and current that the Government did not consider it sufficient to warrant the denial of a passport in February, 1934, February 2, 1937, on November 26, 1937 and on September 26, 1938. Even this accumulation of proof does not stand alone in the record. It is further buttressed by important circumstantial evidence from the Government's own witness, from persons in its employ. Even the information clerk, Miss Hayes, who guided me in filling out the 1934 application, she did it very courteously, as a good public servant, I must say, and she frankly stated that she has an individual recollection of that event after more than five years, that those few moments stand out clearly in her memory among the hundreds of thousands of such instances that she must have had in her own experience. But she says—and she explains it very logically—that she remembers that incident more than five years ago because she immediately recognized me when I made the application, when I filled out the application before her. She recognized me. Not that she had ever seen me before. She recognized me from newspaper pictures, from newspaper pictures.

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Now what is the significance of that, when the information clerk immediately recognized me from newspaper pictures when I walked in to fill out the 1934 application? Miss Hayes further explains she not only recognized my face and my name, she recognized the connection with a certain political organ-

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Summation by Defendant.

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ization. She did not name it, but you all know what it is. It is the Communist Party. She recognized me as the secretary of the Communist Party because of what she had read about me in the newspapers. And I think it was one of the jurors who in the examination made the remark that it would seem to him dishonest for one to deny that he had some prejudice or preconceived opinion about this case, because everyone has read in the newspapers about it, and everybody has formed some kind of an idea about it. But in 1934 Miss Hayes testified also that my face and name and public role were sufficiently known through the newspapers that she, the information clerk, immediately recognized them. Can anyone believe that such a recognition was not accompanied by an understanding that I had been abroad before? At least half of all the publicity surrounding my name has been connected with my trips abroad. Can anyone assume that I was recognized by someone who was dealing with business of trips abroad without also understanding that he was recognizing someone who had been abroad before. And if this applies to Miss Hayes, how much more, how much more does it apply to the higher officials through whose hands this document passed in 1934 clear up to the head of the Passport Division, who later personally dealt with me twice?

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We submit to you, ladies and gentlemen of the jury, that the evidence presented by the prosecution and brought out on the cross-examination of its witnesses is convincing, it is overwhelming, it is conclusive proof that prior to 1934 the Government had knowledge of prior passport issuance, that it did not consider the matter merited further action on its part, that it placed it away in the files for reference. It was therefore not deceived by the 1934 ap-

Summation by Defendant.

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plication. The statement, or word "None" in the 1934 application, even if it is given the interpretation that would make it false, which is not a necessary interpretation—even it were given that interpretation, could not have been effective in inducing the issuance of the passport because of the prior use of the Government. In any event the prior passports were not, and are not now, conceived to be a bar to the issuance of passport rights and documents, and so proven in 1934, 1937 and 1938.

Therefore, when we are forced step by step to go back to 1934 and the application, again we find that this thin web of technical material by which is attempted to bind together all these things, break down, and the evidence submitted by the prosecution is insufficient to prove its indictment.

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It has been and is consistently maintained and emphasized by the defendant from the beginning of this trial, as a matter of weighing the evidence by the jury, and the matters of the Dozenberg-Morris and Richards passports have no proper significance in weighing the evidence about the entries and the issuance of the passport in 1934, and that it violates the long-established rule. But since our position as a matter of law has been overruled by the Court, we cannot argue it here. We are left on this general question, with no remedy at law except such as, should it become necessary, may be later found in other instances. These matters, which we consider extraneous and prejudicial, are therefore before you despite our efforts, and we must deal with them as best we may. Frankly, I must say that this task is not pleasant. Absolutely we refuse—I refuse—to dwell upon these matters any more than is absolutely necessary for overcoming prejudice because I consider that they were introduced for

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Summation by Defendant.

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the purpose of creating prejudice, and that detailed answers would merely forward that purpose. Whatever may have been the legal aspects of the Dozenberg, Morris and Richards passports when they were current questions, the important point is this: that the Government—not I; the Government—demonstrated for ten years that it did not consider these matters important. As to the detailed evidence brought forward on these extraneous issues, all of it merely serves to cover the issues, to draw a red herring across the trail and divert your attention from the issues raised by the indictment.

What is the statute of limitations? Is appeal to the statute of limitations an evasion of responsibility? Taking refuge in technicalities. No, it is not. On this point you have a right to take note that the statute of limitations was not created to serve the interests of defendants. The purpose is to serve the public interest. And the more strictly it is observed, the more the public interest is served.

Let us examine that question a little more, because I am afraid I cannot anticipate what Mr. Cahill will say.

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Mr. Cahill: Do I understand that Mr. Browder intends to go further into the matter of the statute of limitations, from that statement?

The Court: I don't want to get into any argument with him?

Mr. Cahill: But as I understand it, your Honor has ruled on the point.

Mr. Browder: I am not referring to the statute of limitations, as it has been ruled upon by the Court; I am referring to the fact that the statute of limitations does exclude certain evidence that is before the jury from being considered by the jury

Summation by Defendant.

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and weighed as to whether it is a crime or not, because any imputation of a crime is excluded by the statute of limitations. That crime is not being tried here, and it is within my province to argue against any prejudice that might have arisen in the jury on this count.

I am directing myself against prejudice in the jury that might arise from these matters. Therefore it is permissible for me to note that the statute of limitations is not operating in my favor and that I am claiming no privileges that the statute of limitations, in so far as it operates, is in the public interest and is generally understood that its strict application is in the public interest, and that this statute establishes that upon its expiration, what may have been crimes are to be treated as having been condoned because of the failure of prosecution, that it is no longer a crime, that it is the same as if an absolute and unconditional pardon had been granted.

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Mr. Cahill: If your Honor please, I must object. I think it goes far beyond—

The Court: I don't think it touches the issue in the case. Furthermore, as a matter of law I think it has been determined that in so far as the issues in this case are concerned, there is no question of limitations. I think that you either fail to understand, or that you don't understand the issues in this case to concern a use in 1937 and a use in 1938 of a passport which is alleged to have been procured or secured on the basis or by reason of a false statement.

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Mr. Browder: I am very glad that you emphasized that, your Honor. That is what I am trying to em-

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Summation by Defendant.

phasize, but I fear that there has been a different impression,—

The Court: I think the jury understands that perfectly.

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Mr. Browder: —which I am directing myself to overcome. If everything was already clear to the jury there would be no function whatever in a summation. And I think it is the assumption upon which I must go, if I speak at all, that I have something to contribute to clarify the issue. I assume that I speak on that basis, and at this moment I am directing myself to overcoming any prejudice that may be in your mind because you have been faced with evidence about Dozenberg, Morris and Richards, that this may create prejudice in your mind, and I am citing as against such prejudice to argue with you that you should not entertain such prejudice—I am trying to argue, if I am permitted, that my argument has been sanctioned and backed up by the most eminent legal authorities of the American bar. If that is wrong I can only apologize for my lack of legal training. That is my understanding of the laws of evidence in summation and argument. If I am wrong I withdraw it and apologize.

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I would like to point out to you a great danger that might arise if it were permitted to become a practice in this country for charges to be accumulated over years and not prosecuted, accumulated in the files for five, ten, fifteen years, no action taken, but suddenly for some reason somebody wants to take action after 15 years, they can go to the files and take them all out and by some strained construction of the law can take all of that accumulation from the files and put all the accumulated odium upon the act, upon an act, a simple, commonplace, everyday act.

Summation by Defendant.

775

Mr. Cahill: There is no proof in the record of any such statement.

The Court: There is no proof, and there is no charge whatever.

Mr. Browder: I must submit, of course, to the opinion of the Court, and I must confine my argument entirely within those lines which the Court lays down.

I want to further argue, however, I want to further establish that you are not trying me for the Dozenberg, Morris or Richards passports, nor for the 1934 application, nor for the 1934 passport. All of those things are excluded from any charge that is made against me. I have already cited the facts established in the evidence of the Government's witnesses. These things were known to the Government. And in weighing the seriousness of these things, you can take into account that the Government for ten years did not consider them serious enough to act upon. If you have any more doubt of this, refer to the language of the indictment. Under this indictment, in the statute invoked, the charges would have had exactly the same force, no more no less, if the previous passports were all in the name of Earl Browder and not Dozenberg, Morris and Richards. These names are absolutely immaterial to the indictment, because if every passport cited had been under my name the charge would be equally valid and subject to the same punishment.

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And, further, in 1937, instead of presenting my passport to the Immigration inspector to notify him that he had no business with me, if instead of that I had lost my passport, dropped it overboard from

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Summation by Defendant.

the boat and merely informed the inspector, "I am Earl Browder. The newspaper men and photographers will identify and confirm my citizenship"; if that had happened there would have been no crime. Not even Mr. Cahill could have charged a crime then, if I had lost my passport. This little example is very illuminating to show you the fabric of this case.

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I am constrained from going any further into the background of the case. The case has a background. It does not stand by itself. But in arguing before the jury it is not permitted to go into that background. This constraint is not one which I have put upon the case; it is one which is imposed by the Court.

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I will conclude. From the whole conduct of the case before us, from the indictment through the trial, up to this very moment, this case has been upon a level, and of such a nature characterized by the evidence relied upon, its manner of presentation, the reluctance with which certain facts within the possession and knowledge of the Government were finally brought before this Court, from all this it would be possible to conclude upon the face of it that this is a frivolous one, belated and delayed, without substance, incredible and unprecedentedly thin. I say, on the face of it, it could be so understood. Upon its face the Government's case can be best described by a quotation from Lincoln. Abraham Lincoln was speaking about the Supreme Court's interpretation of the doctrine of popular sovereignty, in 1857, when he started 'he big fight against the Dred Scott decision. And in that fight, and during those debates, Abraham Lincoln used these words, which he applied to the Supreme

Summation by Defendant.

781

Court's doctrine in the Dred Scott case, but which can be given a more humble use to describe this case of the prosecution. Lincoln said: "It is as thin as homeopathic soup made by boiling the shadow of a pigeon that is starved to death."

But if the gigantic machinery of justice of our Federal Government moves into action upon such a thing, such a case, it must be assumed that there exists somewhere adequate reasons which we are precluded from looking for and searching for. We are, however, permitted by the rules of this and all other courts to take judicial notice of things which are not in the record here, but which are well established public knowledge. We can refer to past periods in our country's history, some of them within the memory of the generation still living, when cases were brought which were on their face equally flimsy, but were considered serious and vital, and did play serious and vital roles in the determination of what happened to our country. Such periods were those of 1796, 1800, just before Jefferson came to power, when a long series of cases came into our Federal courts which on their face were equally flimsy to this one. We can refer to the period of 1916 and 1917, when there were cases in our courts which also appeared on their face to be flimsy and which later opinion may have predominantly adjudged to have been flimsy and frivolous. But these cases played a great role in the history of our country. They had the most serious significance in spite of their frivolousness. And I am not one to argue that this case is not serious. I would emphasize the serious consequences, not for myself—which, after all, however important it may be for me, is incidental—but for the general structure of

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Summation by Defendant.

American civil liberties, of the rights of American labor, and the American working people.

Mr. Cahill: There is no proof in the record that anybody—

The Court: I don't like to interrupt you, Mr. Browder, but this is a lawsuit, you must remember.

Mr. Browder: I am arguing that this case is serious in spite of what I consider a frivolous appearance, and which does not—

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The Court: Nobody disputes you for one moment on that. It is a very serious case, not only from the standpoint of the Government, but also from your personal standpoint.

Mr. Browder: It is.

The Court: And I don't think there is anything that anybody can say on that subject to add or detract from that statement.

Mr. Browder: Am I permitted to add anything to it if I think it would serve my case before the jury?

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I want to say, if it is permitted and since it has been testified to by some of the witnesses, that I am a Communist, the general secretary of the Communist Party.

The Court: That has nothing whatever to do with this case. Every member of this jury, before the jury was impaneled, stated under oath to you and to the Court that those extraneous considerations would have nothing whatever to do with the decision; and I am certain, as this case is closing, that every member of this jury is going to abide by what he or she said at that time.

Mr. Browder: I don't question that, your Honor. And if I speak of the statements made from the witness chair—

Summation by Prosecution.

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The Court: I don't want to get into any argument about it. I am sorry I brought it up.

Mr. Browder: If I speak about the evidence presented from the witness chair by the prosecution's evidence, the prosecution's witnesses, and it is to the effect that I am the general secretary of the Communist Party, it is not to make a political argument about it. It is merely to make it clear for the record, for the jury, and for everyone interested in this case, that I am a Communist, the secretary of the Communist Party, that I am proud of it, and I have nothing to apologize for because of it at all.

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And one final word. I want to join with the Court in urging upon the jury to deliberate and consider the evidence most thoroughly and carefully, to fix the issues accurately; to weigh the evidence with exactness, to discard all prejudices, preconceptions, and to render a verdict that will be consistent with the best American traditions.

The Court: We better take a recess for a few minutes.

I assume, Mr. Cahill, that you would like to complete your summation before a recess is taken.

Mr. Cahill: Yes, your Honor, I would.

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(Short informal recess.)

(Mr. Cahill summed up the case to the jury on behalf of the Government as follows:)

Mr. Cahill: May it please your Honor, Mr. Foreman and Lady and Gentlemen of the Jury: You have listened here this morning to a great deal of talk, much of it of an oratorical and some of it of an emotional variety.

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Summation by Prosecution.

The summation of the defense was made by the defendant in this case, whom you have heard today not under oath. So far as what I have to say on behalf of the Government is concerned, it will be neither emotional nor oratorical; what I have to say is in the nature of a talk about plain facts, and I shall make no attempt to be flowery. I might say that in the year that I have been here conducting the Government's business, I have become well accustomed to attacks upon myself, such as were made here this morning, but I am not on trial here, the Court is
791 not on trial here, and neither are any of you on trial here. Speaking only for myself, I will say that I do try to the best of my ability to give every defendant who comes into this court a fair trial, and I will leave it to you to say whether in the days that we have been sitting here together, this defendant has not received just as fair a trial as anybody could possibly wish. I would be less than courteous at the outset if on behalf of the representatives of the Government I did not extend to each and every one of you our thanks for the close and earnest attention that you have paid to the evidence as it has gone into the record. Of course you are sitting here today
792 in a representative capacity, discharging what has aptly and I think properly been termed the most important duty that any citizen can be called upon to perform in time of peace.

You are called on to have the courage to decide the issue in this case between the United States on the one hand and the defendant Browder on the other. You recall that in our opening on behalf of the Government we urged you to keep your minds open until you have heard all the evidence. We urged you further, strangely enough, in the light of the statements this morning, to be fair, because to our way of thinking to be fair is to be American, and this is a country where fairness is still the rule. We urged you still further to pay attention to the way in which the

Summation by Prosecution.

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witnesses testified. We pointed out to you then that very often the way a man says something is equally important with what he has to say, and in that connection in regard to one of the witnesses produced on the stand, the witness Powers; Mr. Browder told you this morning that Mr. Powers was the prosecution's own witness, seeking to convey to you a misimpression, as did so many of the statements made here this morning, that we on behalf of the Government have been the associates of Powers. I use that illustratively because I shan't go into all the statements that were made here this morning that were not in any way germane to the issue in this case. I just take the Powers illustration to serve the purpose.

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The Government didn't select Powers. We did not bring Powers here because he was in any sense of the word our choice. Powers, who was torn and thrown overboard and called names here this morning by Browder, was Browder's own selection, his own companion in the days and times when the Morris passport was being obtained, and I want to emphasize that point to you, because if you look at the other arguments made and test them against the same twist, you will see how far wide of the mark most of the statements made this morning were. It ill becomes Browder now, when Powers is on the stand and for the first time telling the truth about the identity of the individual who was the bearer of the Morris passport, to characterize him as shifty. I shall discuss Powers' testimony more at length, but there is a proverb of one of our sister nations to the effect that when a man excuses himself too often, he accuses himself.

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Now, that the evidence is concluded, the responsibility that has rested on counsel for the Government and counsel for the defendant will shortly pass to you, and in your consideration of the evidence in this case what we on behalf of the Government urge you to bring to bear is the com-

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Summation by Prosecution.

mon sense and experience of your everyday lives in business and in the home. Because you are serving here as jurors does not mean that you should deprive yourselves of that richness of tradition and heritage that is yours as Americans.

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Now in going through this brief review of the evidence, bear in mind always that you are the sole judges of the facts, and that Mr. Browder or what I might say as to the facts, if it in any way differs from what you recall the facts to have been, please take your recollection and neither his nor mine because yours alone controls.

So, too, I might say that if in this short summary on behalf of the Government, I omit to refer to any of the testimony, it is not because I don't think it is important.

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We have tried here in the last several days an indictment containing two counts, alleging use of a passport of the United States on two separate occasions, which passport was obtained on an application containing a false statement. Lady and Gentlemen of the Jury, the integrity of our passports is as necessary to protect as the purity of our currency against counterfeiting. The strength of any democratic form of government lies in the respect which it commands not alone from its citizens but importantly as well from the other countries throughout the world. I say to you if today the statement "I am an American citizen" is to have the potency which the declaration in classic times, "I am a Roman citizen," had of that empire of antiquity, and I think today the declaration "I am an American citizen" does have great potency and credence given to that assertion by the furnishing of evidence of such citizenship in the form of a passport of the United States; it must be so strong as to preclude or make unnecessary any inquiry as to the fact, accuracy or veracity of the simple fact stated to be true on the face of the passport.

Summation by Prosecution.

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As you know, those facts which are declared under the seal of the United States on the first page of the passport are the simple facts of everyday life having to do with name, address, place of birth and occupation. And unless and until it has been demonstrated to the satisfaction not only of those who would violate our passport laws from within, but as well to those who have occasion to inspect the passport of our citizens while traveling abroad, that we as a republic, as a democracy, are seriously intent on curbing and punishing irregularities and abuses of a grave nature in connection with the use of our passports. We cannot seriously complain that the same conduct of the United States through its citizens is questioned and viewed with suspicion, where they should rightfully give complete protection, safeguard and expedition to its bearers.

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You know, in presenting the case for the defendant, Mr. Battle was forced to admit the fact as to the Richards passport, and I take as my text for this summation his statement in that connection, and I quote "We do not deny that in 1931 a passport was issued to him in the name of Albert Henry Richards. We do not deny that he used that passport. It is in evidence that he is an official of the Communist party, and it is in evidence here that he went abroad from time to time. Now, it is perfectly obvious, and I don't think we need any proof to show, that a member or an officer of the Communist Party in going abroad, going through those troubled countries in Eastern Europe, might very well meet difficulties if he was traveling under his own name. A man known to be the secretary of the Communist party might have all sorts of difficulties put in his way, and that affords a very sensible reason for a man not wanting to travel under his own name." That is the end of the quotation.

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In effect then Mr. Battle says that all that Browder did do was to travel incognito, and I believe that at another

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Summation by Prosecution.

point in his opening address Mr. Battle used that very term. To my way of thinking that is a classic bit of understatement. Let us look at the known factors in that connection. Was the United States allowed to go incognito? Was the United States left out of Mr. Browder's plan and scheme to avoid trouble? Certainly not. The United States was used and misused. The Great Seal of the United States was Browder's guarantee to expeditious and safe conduct, and further, in the language of the passport itself, Mr. Browder was commended by the Secretary of State to all to whom it may concern, to permit him safely and freely to pass and in case of need to give all aid, lawful aid and protection to him.

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Now, Mr. Browder, as I listened to him this morning, did not think for a moment of not abusing the United States; he was bringing disgrace on his country for so selfishly and fraudulently misusing its credentials, nor did he give thought to it from the standpoint of the thousands, the millions of our citizens who use American passports and who must of necessity in matters of business and pleasure as well in their travels throughout the world, use passports; he did not give thought to the countless and endless difficulties at border stations, at ports of arrival and the like. He didn't think of the troubles and travails he would cause the great body of our people through suspicion and doubt that he by his desire to avoid trouble for himself would cause by casting that doubt on the veracity and the accuracy of the statements appearing on the face, of the safe conduct of the United States in the form of its passport. To sum it up then, in the language of Mr. Battle, his counsel, we have here the case of a man who sets himself up, sets his own purposes up and above and beyond those of the requirements laid down in our democratic form of government by the laws enacted in the Congress of the United States, and particularly that law which I read to you in the opening, which

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Summation by Prosecution.

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requires that the application for a passport contain a true recital of all the facts.

Mr. Browder took most of his time this morning to emphasize to you this, as he put it: "the only thing I am charged with is writing in the single word 'None' in answer to a question, 'My last passport was obtained from'".

Now, let us look into that a little bit. Had Mr. Browder let us say at the time he got the second passport, the Morris passport, in answer to that same question in the Morris application, "My last passport was obtained from" and he said "The last American passport I obtained was in the name of Nicholas Dozenberg, and at that time I said I was born in Russia and that I was naturalized in the United States District Court in Boston," less discredit to our country, less discomfort to our people would have been caused, because then the offense would have been nipped in the bud on the occasion of its first occurrence. But no, Mr. Browder went on, and note the artfulness in his method, the scheming of him in connection with that Morris passport. It appears, as you recall, from the testimony of Powers, that an investigation was made in 1929 because the Morris passport was suspect. Mind you, Mr. Powers was questioned in the presence of lawyer Brodsky, and the agent of the Government was told that Morris was Morris and not Browder.

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Now, take another illustration there of the way the facts can be twisted. We listened at great length this morning to argument based on the passage of years, and as I listened to those words it occurred to me that it was like a man trying to take advantage of his own wrong, setting his own wrong up as a justification for his offense. Take another illustration in the orators of years ago. The orators were wont to set up straw men for themselves in order that they could appear to be making a point by meeting the straw men that they set up there. You will recall the examination that Mr. Dunigan put Powers through, bring-

Summation by Prosecution.

ing him nicely point by point to that interesting moment when Mr. Powers had the realization that Morris was Browder, and you will recall that Mr. Dunigan put the question, "When you came to that conclusion, did you go back to the Government and did you tell the Government that you had testified falsely to the Government when you told them that Morris was Morris and was not Browder?"

You will recall that Powers said he did not.

Now, having thrown the Government off through the
 809 testimony of the man that he, Browder, now tries to cast aside, but you and I know the man went down as the identifying witness on the Morris passport, Browder gets up here and argues for more than half his time this morning that the investigation into the Morris incident shows that there was nothing to the entire charge. If ever there was an attempt to profit by one's own wrong, this is an attempt here by Browder to profit by the lying of Powers in 1929, and I will tell you how much deeper that goes and the artfulness of this; the Morris passport was issued in 1927, and unless it were renewed it would expire two years thereafter, in 1929. Now, it could have been renewed, as we all know, in 1929. That covered a period
 810 of two years. But here is where the wilfulness of the whole scheme is patent, and it is fair for you to infer whether in the light of what occurred, Powers or the lawyer Brodsky didn't tell Browder of their interview with the Government agents, because the fact of the matter is that the Morris passport was not presented for renewal.

Now, that is very important. I think it is of vital importance. What they did shows the depth of the scheme. Although they could have renewed the Morris passport if they were not availing themselves of Powers' lying and what information they must have gotten from Powers or Brodsky that the Government had suspicions of that passport, Browder took another name, this time Richards, and

Summation by Prosecution.

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mind you, he got the Richards passport in 1931 when the Morris passport, had it been renewed, would still have been valid.

Now, does that look like the work of a man who didn't know and takes the benefit of the fact that Powers had lied to the Government agent? And mark that in contrast again, because in the case of the Richards passport which he knew was not suspect, there when that came up for renewal, he presented it to the passport agency in Chicago and had it renewed for a further period of two years. In fact, as you will recall, having in mind the date by virtue of the renewal of the Richards passport, taken in conjunction with the application for the passport in his own name on September 1, 1934, Browder was in possession of two United States passports for a period from September 1, 1934, until November 19, 1935. He was in a position where at any passport station, any border station or the like, if he saw an inspector that he did not particularly want to give him trouble, he could decide whether he was Richards or Browder, and produce the seal of the United States to prove his point. Now that was the grand use of the freedom of our country and the safe conduct, as set forth in these passports, that this native born American citizen, Browder, was given. And the argument that was made here this morning, that if you go on and read the second half of the sentence which follows, or the line which follows "My last passport was obtained from", that other line contains the language, "and is submitted herewith for cancellation."

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For anybody to argue that that doesn't really mean anything, I don't comprehend, because, of course, Browder did not answer the second half of the question, did not put anything down about why the last previous passport was not submitted for cancellation, which is this other half of the statement he talked about so much, and it is per-

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Summation by Prosecution.

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fectly natural why he didn't; he was following out the wilful scheme shown in the line above, "My last passport was obtained from—None." Because, if he had answered the next line and had submitted it herewith for cancellation and had told the truth when he got the Morris passport, he would have to say, "Sorry, Mr. Secretary of State, the last time I said I was Nicholas Dozenberg, born in Russia. So here is the Dozenberg passport." And at that time he would have been caught. Had he answered that second question at the time he got the Richards passport he would have had to say, "I am sorry, Mr. Secretary of State, but I have abused the United States the last time, because on the last trip I was Morris," or had he gotten a passport in his own name, on the occurrence of any of these events Mr. Browder would have been caught.

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I don't care what class of crime it is, whether it be counterfeiting, whether it be passports, or be bank fraud, the slip on which any criminal is caught is invariably a small one, because the shrewd, the wise, the artful one has availed himself of what he thinks are all the angles, and he has covered the big ones, and he slips his foot on the small one, and it is invariably the argument, as made in the summation, that if he really had intended to do something wrong, he wouldn't have slipped on something so small. But what causes the Government to learn of the offense, as I have said, is generally one thing they don't think they can be trapped by, and what you have to judge in this case is whether, when the oath was administered by the representatives of the State Department on four separate occasions to this man and he swore that the statements set forth in the application for passport were true, means anything, means anything particularly when given in connection with an application to obtain one of the most solemn and sacred documents that it lies in the possession of our country to give, it is safe conduct to one of its citizens.

Summation by Prosecution.

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You may ask yourselves further whether it means anything not only for him to swear falsely and perjure himself on each and every occasion, but as well whether it means anything to have willing tools and to corrupt them and to bring them in to set our laws at naught; to tamper with our vital statistics, to make a laughing stock of the protection that we put about our vital statistics, and I refer to such sacred documents as the naturalization papers of an alien who had become a citizen of the United States, and I refer to birth certificates, proof of American birth. I refer again to affidavits of birth, to notaries public, and finally to the flesh and blood witnesses, witnesses of identification, or the witnesses to identify, all of whom were corrupted, all of whom were brought in and caused to swear falsely.

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Now, I say to you that those are the questions you must decide; whether the committing of these acts and the presentation of that bulk of false and fraudulent material means anything in this country of ours.

Mr. Browder spoke this morning of a herring as being drawn across the trail, and almost at the very point that I heard that I learned of the publicity attendant upon his arrival in the United States on the two occasions where he traveled on the passport under his own name. He went on at length with that, and I waited eagerly and impatiently to hear of the popping of flashlights from photographers' bulbs on the occasion when he came in as Nicholas Dozenberg, and when he came in as Morris, and when he came in as Richards, but I waited, and you waited, and we all waited in vain for a single mention of the circumstances surrounding his arrival in our country on any of those occasions. You know, it is so patent as you go through this case that Browder knew exactly what the regulations of the Government in regard to passports were, and that he applied all the skill that he possessed and what

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Summation by Prosecution.

resources he had to set the safeguards of our country at naught.

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Let me illustrate that point: do you recall early in the case we had a young man come over from Ellis Island who told us that it is impossible to check up on the arrival in the United States of a person by merely giving the name; that you have got to have not only the name but you have to have as well the day of arrival and the name of the ship on which the person came over. Now, Browder shows full well in his conduct, in the evidence throughout this case, his appreciation of the need for that information, as to the importance of the answer to the question as to where the last passport was obtained. This case is the best illustration of the importance of that question. The question is designed among other reasons to detect and bring about the prosecution of just such crimes as this, or, as Mr. Bell, the passport agent, well put it, to see to it that nobody has two passports of the United States in his possession even under his own name. This argument was further advanced this morning: "Well, I could have gotten in anyway. I didn't need to use this." That comes as almost a slap in the face to me because after a man has made a mockery of everything that we hold dear, natural-

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ization papers, records of birth, oaths taken solemnly, then to come and say to us in this courtroom, "Well, that is just technical. What does that mean, after all? I didn't have to do it. I could have come in in some other way, and the immigration people couldn't have kept me out."

That reminds me of the fellow who was caught going through the second story of a bank at night and his defense was that he had money in the bank and that all he intended to steal was the exact amount he had there, and the fact that he did not go in through the front door or between the hours of nine and three, that was merely technical, he didn't realize that he was committing a burglary.

Now, when a man presents the credentials of the United

Summation by Prosecution.

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States and uses them and does that on the basis of false statements, then after he has made a laughing stock of us all and made a mockery of our institutions, to stand in front of us and say, "It is just technical; I could have done it some other way and not committed any offense," is an insult.

The fact is that not only did Mr. Browder use passports, but I think it is a fair statement to make on the evidence in this case that he was fond of passports and found that he could expedite himself in his activities, as Mr. Battle told us, through this scheme which he thought would render him free from detection, and he got so bold in this that he used it four times.

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In almost any American game, particularly baseball, three strikes is out, but Browder got away with four, and it was on the fourth strike that he was caught.

If ever there was deliberation, aggravation, wilful intent, it is in this particular case.

Now as to the use these passports were put to, we have this Exhibit 5 in evidence here, showing the stamp, and I urge you to take it with you and look it through; look at all the stamps that are on it, and have in mind the testimony of Bedacht, that Browder was in Moscow in 1921 and again in 1933; and have in mind also the testimony of Siegel, of the State Department, that the files of the State Department had been searched and do not show any application for a passport in the name of Browder prior to September, 1934; and bear in mind further that the earlier of these two visits to Moscow was in the lifetime of the Dozenberg passport, and the later was in the lifetime of the Richards passport.

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Lady and gentlemen, if there was a George Morris, if there was a Richards who used the passports in these names, where are they? Why weren't they produced?

The testimony as to those passports, like all the testi-

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Summation by Prosecution

mony in this case, stands uncontradicted. Have that in mind.

Can there be any doubt in your mind as you look at these passport applications and the photographs appearing on them, that each and every one of these photographs was a photograph of Browder at a different period in his life? Whether or not he gave his occupation as he did, a journalist, or with a fine touch of humor, as he did in the Richards case, just to make the thing a little more dramatic; in the Richards case he put himself down as a musician, blowing the sour note on others.

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Well, finally, coming down to the last witness in the case, the handwriting expert, Blackburn, and I waited for a prolonged cross examination as to what Blackburn had to say, and I was surprised that about all they could find was that he like myself was an employe of the Department of Justice, but to turn to the more serious parts of his testimony, and I call your attention to the fact that there was no argument made on this at all this morning; you have definitely in mind the manifestation of the identify in both the conscious and unconscious characteristics in the writings. One reason why I like to use Government experts is that they do testify with candor and frankness, and you will recall in the Dozenberg situation Mr. Blackburn pointed out to you that there was a pictorial similarity between the "Dozenberg" as signed on the naturalization certificate and the "Dozenberg" as signed on the passport application. So he went on to tell you that that pictorial similarity arose from an attempt to simulate or imitate one handwriting.

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I will not go at much further length into that testimony. The word "None" occurs to me as being the word that shows the identity of the handwriting on all four applications. The words "New York" occurred to me as an excellent illustration.

Summation by Prosecution.

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Now, lady and gentlemen, I have about concluded, and in leaving the case on behalf of the Government with you, I again say that you bring your common sense to bear, and as you sit in the jury room think of yourselves in your offices and in your homes. Ask yourselves, how do these things happen? And bear in mind that you are the first jury that has ever heard this testimony and you have had demonstrated before you how this did happen. Bear in mind further that you are sitting here in a representative capacity, that you are discharging an official duty, and when Mr. Browder tells you that this is an important case to the defendant, it is; so too, is it an important case to the Government, and the people of the United States await your verdict, and I say to you that when abuses of this kind are brought to light, for our own protection they must be relentlessly exposed, because abuses of this kind not only cast reflection upon the good name of our country but as well cause endless embarrassment, delays and law-suits to our men and women traveling under the safeguard of an American passport. We can't leave the situation to some foreign official, on looking at an American passport and seeing the name Browder, to say, "Now, are you really Browder or are you Dozenberg, Morris or Richards?" And for Browder to say, "Oh, I made a mistake; I handed you the Browder passport. Just give it back; I will give you the Richards."

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Now, the American people have a sense of humor, but there does come a time where such light treatment of our sacred institutions merits a stinging rebuke for the prostitution and the abuses and uses not only of our vital statistics, but as well of the safe conduct given to our citizens abroad.

Lady and gentlemen, the evidence in this case I think demands a verdict of guilty.

The Court: I rather suppose that the jury wants to take a recess until after lunch.

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Defendant's Requests to Charge.

The Jurors: Yes, your Honor.

The Court: All right, we will take a recess until two-thirty p. m.

(Recess until 2:30 p. m.)

(The defendant's requests to charge are as follows:)

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1. The defendant is presumed to be innocent until the contrary is established beyond a reasonable doubt. (Charged.)

2. The presumption of innocence is not a mere formality. Every juror is bound to entertain it conscientiously, sincerely and without any mental reservations or evasion whatsoever, and to give to the defendant the full benefit of it. (Charged in substance.)

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3. In deciding the question of reasonable doubt, which each juror must decide for himself, he must not allow his previous opinions or impressions to affect, impair or destroy a doubt which otherwise he would entertain upon the evidence. Each juror must dispel any impression or preconceived notion which he may have derived from the reading of newspapers. (Allowed.)

4. Before you can find the defendant guilty, the facts proved must not only all be consistent with the theory of the defendant's guilt, but they must each and every one be absolutely inconsistent with the theory of innocence; otherwise, you must acquit. (Charged in substance.)

5. The denial of the motion to dismiss the indictment made by the defendant's counsel at the close of the Government's case, and the denial of the motion made by the

Defendant's Requests to Charge.

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defendant's counsel at the close of the entire case, are not to be taken by the jury as any indication of the guilt of the defendant. (Charged in substance.)

6. The jury, in determining the guilt or innocence of the defendant can consider only the evidence of the case and are to disregard any statement made during the course of the trial by counsel and the Court not supported by evidence, and they are not to be influenced or governed by any expression of opinion or action of either Court or counsel. (Charged in substance.)

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7. The jury, in considering this case after its submission to them, must proceed upon the presumption that the accused is innocent of the crime charged in the indictment, and that it is necessary for the Government to rebut this presumption by the evidence which convinced them beyond a reasonable doubt that the defendant is guilty of the crime charged. (Charged in substance.)

8. The burden of proof in this case rests with the Government from the beginning to the end of the trial to establish beyond a reasonable doubt every fact essential to the conviction of the defendant, and if the Government has failed to prove such beyond a reasonable doubt, the defendant must be acquitted. (Charged in substance.)

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9. The fact that the Court has denied motions made from time to time by defendant's counsel on behalf of the defendant, and the rulings of the Court upon objections, and the refusal of the Court to charge as requested, are not to be taken as any expression of opinion on the part of the Court upon the facts of this case, but must be regarded only as rulings upon the law concerning which the jury has no interest. (Charged in substance.)

Defendant's Requests to Charge.

10. In weighing the testimony and arriving at the verdict, the jury must not be influenced by questions of public interest or public policy, newspaper articles, the effect of their verdict upon other persons charged with crime, whether the verdict would or would not be pleasing to the judge, or any other consideration outside of the evidence in this case. (Allowed.)

839 11. If the evidence against the defendant is equally consistent with innocence and guilt, the jury must adopt the construction in favor of innocence, and must acquit. (Allowed.)

12. The failure of the defendant to take the witness stand to testify in his own behalf does not create any presumption against him; the jury is charged that it must not permit that fact to weigh in the slightest degree against the defendant, nor should this fact enter into the discussion or deliberations of the jury in any manner. (Charged.)

840 13. The fact that the defendant on trial has been indicted is not to be taken in the slightest degree as indicating his guilt. Consequently, the jury must not give any weight whatsoever to the fact that an indictment has been returned against him. To no extent whatever does any charge in the indictment prove the fact of which it speaks or the guilt of the defendant on trial, and the jury must ignore it entirely as effective for such purpose. It does not even create nor should the jury permit it to create a suspicion of guilt. (Charged in substance.)

14. The presumption of innocence survives the filing of an indictment, arrest, arraignment and the empanelling of a jury for the trial of the issues. It continues during the introduction of evidence upon the trial, the summing up of counsel, and the charge of the Court. (Charged in substance.)

Defendant's Requests to Charge.

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15. It is not necessary for this defendant to prove his innocence, but the burden of proof rests upon the prosecution to establish every element of the offense with which he is charged, and every element of such offense must be proved to a moral certainty and beyond all reasonable doubt. If the prosecution fails to establish to a moral certainty and beyond all reasonable doubt any one element of the offense with which the defendant is charged, and which it is necessary to establish in order to convict, or if there remains in the minds of the jurors a reasonable doubt as to whether or not the prosecution has established any one of such elements, constituting the offense, to a moral certainty and beyond all reasonable doubt, then you must find the defendant not guilty. This applies to the jury as a whole and to each individual juror. (Charged in substance.) 842

16. Reasonable doubt is doubt based upon reason which is reasonable in view of all the evidence. To overcome such reasonable doubt requires such proof as satisfies the judgment and conscience of the jurors and each of them that the offense charged has been committed by the defendant and as to leave no other reasonable conclusion possible. Otherwise, the jury must acquit. (Charged in substance.) 843

17. Mere probabilities or suspicions are not sufficient to warrant a conviction nor is it sufficient that the greater weight or preponderance of the evidence supports the allegations of an indictment, nor is it sufficient that upon the doctrine of chances it is more probable that the defendant is guilty than innocent. The jury are not concerned with probabilities, but only with evidence. (Allowed.)

18. That the actions of the Court during this trial in passing upon motions made by the defendant, or in over-

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Defendant's Requests to Charge.

ruling objections made by him, or of sustaining objections made by counsel for the Government, are not to be taken as an indication of the guilt or innocence of the defendant. Counsel for the defendant not only have the right, but are charged with the duty of objecting to the introduction in evidence of any statement or exhibit offered by the Government which such counsel for the defendant believes, under the rules of evidence, should not be admitted. The jury must understand that the Court has no opinions and expresses no opinion as to the guilt or innocence of the defendant. (Charged.)

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19. While it is desirable that the jurors agree upon a verdict after a full and fair discussion, nevertheless, it is the duty of each and every member of the jury to decide the issues presented for himself or herself, and if, after a careful consideration of the evidence in the case and the instructions of the Court and a free consultation with his fellows, there is in any juror's mind a reasonable doubt as to the defendant's guilt, it is his or her duty, under his or her oath, to stand by this opinion. No juror should yield his or her view simply because all the other jurors may disagree with him or her. (Refused.)

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20. I charge you as a matter of law that a native-born American citizen, as the defendant herein is conceded to be, has an absolute right to enter or leave this country without a passport (but must show he is an American citizen). (Allowed with addition.)

21. The fact that the defendant arrived into the United States on April 30, 1937, and February 15, 1938, on foreign boats, is of no consequence in determining his right to enter the United States on these occasions. (Allowed.)

22. Under the first count of the indictment, the defendant is charged with the use and attempt to use a passport,

Defendant's Requests to Charge.

847

on the 30th day of April, 1937, for the purpose of gaining entry and admission into the United States at the Port of New York. Under the second count of the indictment, the defendant is charged with the use and attempt to use a passport, on the 15th day of February, 1938, for the purpose of gaining entry and admission into the United States at the Port of New York. Each count charges a distinct crime. If the jury find that the use described herein is not such as was contemplated by the statute, then they must acquit. (Refused.)

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23. In this connection, the jury must take into consideration that a passport is a document which, from its nature and object, is addressed to foreign powers, purporting only to be a request that the bearer of it may pass safely and freely, and is to be considered rather in the character of a political document, by which the bearer is recognized, in foreign countries, as an American citizen, and which, by usage and law of nations, is received as evidence of the fact. It is a document issued by the Secretary of State, or under his authority, by a diplomatic or consular officer of the United States, stating his citizenship and requests for him free passage and all lawful aid and protection during his travels or sojourns in foreign lands. (Refused.)

849

It is intended only for use abroad, and has no sanctioned uses, customary or statutory, within the United States.

24. It was not the intention of Congress, in enacting Section 220 of Title 22, United States Code, to punish a person who uses a passport in the manner charged in this indictment. (Refused.)

25. I charge you as a matter of law that the defendant had the absolute right to enter into the United States even though he did not have a passport, provided, however, he

850

Defendant's Requests to Charge.

could, by means of any satisfactory proof, establish that he is a native-born American citizen, that is, by documents such as a birth certificate, baptismal certificate, or other proof that he was born in the United States. The fact that he may have used a passport for this purpose is not a "use" as contemplated by Congress in defining the crime. (Refused.)

26. If you should find that the sentence in the application for a passport, executed by the defendant on or about August 31, 1934, which reads as follows:

851

"My last passport was obtained from

_____ (Insert Washington or location of office abroad)

on _____ and is submitted herewith

(Date)

for cancellation. _____

(Give disposition of

_____ passport if it cannot be located.)"

852

was interpreted by the defendant to mean that he did not have any passport in his possession to be submitted for cancellation, and that it was not his intention to conceal from the Government the fact that he previously had obtained another passport, then it is your duty to find the defendant not guilty. (Refused.)

27. If the statement in the application for the passport, dated August 31, 1934: "My last passport was obtained from _____

(Insert Washington or location of office abroad)

on _____ and is submitted herewith for

(Date)

Defendant's Requests to Charge.

853

cancellation.", could be reasonably interpreted as meaning, "If you have your last passport, obtained from Washington, or abroad, submit it for cancellation", and the defendant honestly and with good cause, so interpreted the said statement, then the word "None" was not a false statement, and the defendant cannot be held to have made a false statement. (Refused.)

28. The application for the passport was drawn by a Department of the Government and if the statement in the application herein involved is ambiguous, it should be construed strictly in favor of the defendant. (Refused.)

854

29. Falsity consists in knowingly affirming a condition without probable cause and probable cause must be estimated not from the jury's standpoint but from the defendant's. (Refused.)

30. Although the Government in its indictment charges by quotation from this sentence, "My last passport was obtained from", and does not complete the sentence as contained in the application blank, which was introduced into evidence by the Government, it is your duty in arriving at a determination of the interpretation of this sentence to read it in its entirety with a view to determining its entire context, and not merely that portion of the sentence which has been quoted in the indictment. (Refused.)

855

31. If you should find, after interpreting this entire sentence, that the defendant concealed the fact from the Government that he had a prior passport, then you must determine further whether such concealment was willful and material; if not, you must acquit. (Refused.)

32. Even if you find as a matter of fact that the word "None" was a materially false statement, you must acquit.

856

Defendant's Requests to Charge.

this defendant if the passport issued herein was used merely as evidence of his conceded identity as a citizen of the United States on the occasion of his arrival at the Port of New York on the 30th day of April, 1937, and on the 15th day of February, 1938. In this connection, you must remember that the defendant is conceded by the Government to have been a citizen of the United States at all times since his birth in this country. (Refused.)

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33. If you find that the presentation of the passport on those two occasions was only for the purpose of identifying himself as a citizen of the United States, and not for the purpose of gaining a privilege as is intended by the inherent nature of a passport when used in foreign countries, then you must acquit the defendant. In determining the inherent nature of a passport, you must bear in mind that a passport has no sanctioned use, in law or custom, insofar as an American citizen is concerned, within the Port of New York. (Refused.)

858

34. The mere fact that the passport was stamped by a Government immigration inspector does not in and of itself constitute a "use". (Allowed.)

35. A Government immigration inspector has only such authority as is conferred upon him by law. His authority, therefore, is limited solely to the exclusion of such aliens who, by law, are not entitled to enter this country. He has no power to exclude an American citizen for any reason whatsoever. (Refused.)

36. An American citizen may be guilty of crime, or he may be diseased, or he may be otherwise undesirable, but nevertheless, a Government immigration inspector has no jurisdiction whatsoever to pass upon his right to enter this country. He must, as a matter of law, permit him to enter

Defendant's Requests to Charge.

859

the country, when satisfied that he is an American citizen.
(Refused.)

37. The immigration inspector, Larson, had no right to bar the entry of the defendant into the United States on April 30, 1937. (Allowed.)

38. The immigration inspector, German, had no right to bar the entry of the defendant into the United States on February 15, 1938. (Allowed.)

39. The presentation of a passport to an immigration inspector employed by the United States Government for the purpose of identifying the defendant as an American citizen, is not such a utilization of a passport as is inherent in its nature, and is therefore not a "use" of such passport within the contemplation of Title 22, Section 220 of the United States Code, as charged in the indictment.
(Refused.)

860

40. Although there has been some testimony introduced by the Government to the effect that the defendant at various times was identified and seen in Moscow, such fact nevertheless must not be considered by you in determining the significance of the use to which this passport has been put. The issue before you is the one that is raised in the indictment. You cannot go outside of the indictment in considering whether the passport was used abroad. You must, therefore, completely disregard the testimony of the witnesses who testified that they saw the defendant in Moscow. (Refused.)

861

41. You are not permitted to infer from the fact that the defendant used the passport or may have used the passport in his travels abroad, that he therefore violated the law. You must limit your consideration solely and ex-

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Defendant's Requests to Charge.

clusively to the presentation of the passport to the American immigration officers in the Port of New York on the specific days mentioned in the indictment, that is April 30, 1937, and February 15, 1938. (Allowed.)

42. There was no law or rule authorized by law at the time the statement was made in the application, which prohibited the issuance of more than one passport to the same citizen. (Denied.)

863

43. There was no law or rule authorized by law at the time the statement was made in the application which provided that a citizen might not, for each journey that he made, secure another passport even though his prior passport remained unexpired or uncanceled. (Refused.)

44. There was no law or rule authorized by law at the time the statement was made in the application binding upon an applicant for a passport, which provided that a prior passport had to be submitted for cancellation as a prerequisite to the issuance of a new passport. (Refused.)

864

45. The defendant is not here on trial for obtaining passports under the name of Dozenberg, Morris or Richards, in 1921, 1927 and 1931, respectively. Even if you find that the Dozenberg, Morris and Richards passports were illegally obtained and used, but on the other hand find that the Earl Russell Browder passport of 1934 was properly obtained and used, then it is your duty to acquit this defendant.

46. The defendant is here on trial solely for the alleged use of the passport issued to him on September 1, 1934, under his own name, Earl Russell Browder. You must not be prejudiced by the introduction of the proof concerning Dozenberg, Morris and Richards passports, as they do

Defendant's Requests to Charge.

865

not constitute the offenses for which the defendant is now here on trial. Those offenses, if they are such under the law, are outlawed by the statute of limitations. (Allowed.)

47. If you find that the United States Government, through its agents, had knowledge in 1929 of the fact that the defendant had obtained a passport in 1927 under the name of Morris, then you may consider that fact as continuing to exist in the knowledge of the United States Government up until the time that he applied for a passport under the name of Earl Russell Browder. And in that connection, you may consider the testimony of the Government witness, Bell, who testified that there appeared a notation on the Morris application, made in 1929 by a Government employe by the name of Miss Wright, as follows: "Recorded in Fraud File as suspect, 12/2/29, Wright". In this connection you may further consider the testimony of the witness, Powers, a Government witness, who testified in answer to the prosecutor's inquiry that he had been visited, in 1929 by a Government agent and questioned concerning the Morris application, which the said agent exhibited to him, and questioned further whether Browder could have been Morris; and in spite of this knowledge the Government issued a passport to the defendant in 1934. You are therefore to consider the foregoing in determining whether the Government was or was not misled by the word "None". (Refused.)

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48. The alleged false word "None" in the application for the passport, dated August 31, 1934, must have been the effective cause of inducing or securing the issuance of the passport which was used on April 30, 1937 and February 15, 1938; and if you are not convinced of that beyond a reasonable doubt, then you must acquit. (Refused.)

49. If you find that the word "None" is no answer to the question "My last passport was obtained from", then

868

Defendant's Requests to Charge.

such statement contained in the word "None" cannot be the basis for the charges in the indictment that the defendant made a false statement in order to obtain the issuance of the passport issued on September 1, 1934; and if you so find, you shall acquit the defendant. (Refused.)

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50. If the jury should find that at the time of the issuance of the Earl Russell Browder passport, September 1, 1934, the Government had knowledge or reason to believe that accused had prior thereto received a passport, then the jury should find that the Earl Russell Browder passport was not secured by reason of the allegedly false statement "None" made in the passport application. (Refused.)

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51. If the jury should find that at the time of the renewal on February 2, 1937, of the Earl Russell Browder passport issued September 1, 1934, the Government had knowledge or reason to believe that accused had prior thereto received a passport, then the jury should find that the Earl Russell Browder passport was not secured by reason of the allegedly false word "None" made in the passport application; and that in any event whatever impropriety existed in securing the issuance of said passport was rendered harmless and immaterial by such knowledge or notice existing at the time of said renewal. (Refused.)

52. In determining whether or not the Earl Russell Browder passport issued September 1, 1934, was secured "by reason of" the allegedly false word "None" in the passport application, the opinions of the clerks or officials of the State Department are to be disregarded by the jury, and that question is to be determined solely with reference to the Congressional statutes and the Presidential rules then in force governing the issuance of passports. (Refused.)

Charge of the Court.

871

53. If you find that the renewal application, which has been offered by the Government in evidence, executed in 1937, is a separate and distinct application for a passport, even though the physical document brought into being was identical to the original document which he had obtained on the application made in 1934, and if you find that there were no false statements of a material nature contained in such renewal application, then it is your duty to acquit this defendant. (Refused.)

54. You must always bear in mind that the Government cannot prevail unless it proves beyond a reasonable doubt two important factors: First, that the application which induced the issuance of the passport was materially false; and second, that the use of the passport so issued was in violation of the statute, as contemplated by Congress. On the other hand, if the Government fails in proving any one or both of these factors, it is your duty to acquit this defendant. (Charged in substance.)

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55. Although the same section makes it a crime to make a false statement of a willful and material nature in an application for a passport, this is not the part of the section for which the defendant here is on trial. If this is all that the Government proves, you must acquit the defendant. (Argumentative. Refused.)

873

Charge of the Court.

(Afternoon session—2:30 p. m.)

The Court (Coxe, J.): Members of the Jury, this is an indictment in two counts, against Earl Russell Browder, for wilfully and knowingly using on two occasions, a passport alleged to have been secured by reason of a false statement.

874

Charge of the Court.

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The first count charges that the defendant obtained a passport, number 145182, in his own name on September 1, 1934, on an application executed by him, in which he wrote the word "None" in a blank following the printed words of the application, "My last passport was obtained from"; that this statement was false because the defendant had obtained three earlier passports, one in the name of Nicholas Dozenberg in 1921, another in the name of George Morris in 1927 and a third in the name of Albert Henry Richards in 1931; that the 1934 passport issued to the defendant was renewed on February 2, 1937, and further that this passport, namely, the 1934 passport issued to the defendant, was wilfully and knowingly used by the defendant before the immigration and naturalization service on April 30, 1937, in securing entry into the United States.

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The second count in all respects is identical in phraseology with the first count except in one particular, namely, that it omits the allegation that the passport was used on April 30th, 1937, and alleges in place thereof that the passport was used by the defendant wilfully and knowingly on February 15th, 1938, for the purpose of gaining entry into the United States.

The two counts in the indictment are framed under a federal statute which provides that anyone who shall wilfully and knowingly use or attempt to use any passport the issue of which was secured in any way by reason of any false statement, shall be guilty of an offense against the United States:

Under this statute it is necessary for the Government to show, first, that the issue to the defendant of the 1934 passport was secured in any way by reason of any false statement, and second, that the defendant wilfully and knowingly used the passport on either or both of the two occasions mentioned in the indictment. The words, "wilfully and knowingly," as employed in the statute, mean

Charge of the Court.

877

deliberately and with knowledge and not something which is merely careless or negligent or inadvertent. The issuance of passports generally is regulated by statute, that is, a statute of the United States, requiring a sworn, written application by the applicant as a prerequisite to the issuance of the passport, containing a true recital of each and every matter of fact which may be required by law or by any rules authorized by law.

I shall not attempt any extended review of the testimony produced by the Government. That is hardly necessary in a case of this kind, which has not taken a long period of time to try, and which I am sure is fresh in your recollection at the present time. 878

Much of the testimony was directed toward the practice in the issuance of passports, and also toward explaining the routine of the Government officials in connection with the passports involved in this case.

It has been stipulated that the handwriting appearing on the 1934 passport or rather on the application for the 1934 passport, was largely that of the defendant, and the principal issue in the case is whether the word "None" following the printed words "My last passport was obtained from", was a false statement—a knowingly false statement. 879

The testimony of the Government in support of the allegation of the indictment that the statement was false, concerned the Dozenberg, Morris, and Richards passports mentioned in both of the counts. The Government contends that each of the applications for these three earlier passports was in fact made by the defendant and that the passports themselves were obtained by him. It is not necessary, however, for the Government to show that all three of these earlier passports were obtained by the defendant in order to establish the falsity of the statement. Satisfactory proof as to one of them will be sufficient for that purpose.

Charge of the Court.

I should like very briefly to indicate or to point out to you some of the testimony which the Government relies on in this case in support of its contention that the three earlier passports were in fact obtained by the defendant.

First, there is the testimony from various witnesses that the photographs on the three earlier passports appear to be photographs of the defendant, and that testimony, as you will recall it, came not only from Dozenberg but from Bedacht and also from Powers.

881 Second, there is the testimony of Dozenberg that the application for the 1921 passport is neither signed by him nor was it in his handwriting, nor was the passport issued to or obtained by him.

Third, there is the testimony of Powers, the identifying witness to the 1927 passport, that he learned subsequently to 1927, when the passport was issued, that the George Morris for whom he acted as an identifying witness was Browder, the present defendant.

882 Fourth, there is the testimony of Blackburn, the special agent of the Federal Bureau of Investigation, that the handwriting on all three of these earlier applications is that of the defendant. And I need not comment on that testimony, for you all saw the demonstration made by Blackburn when he gave his testimony. It was not so much the opinion which he gave after pointing to the various parts of the applications which he thought were indicative of the fact that the handwriting was the same in all three applications, but in the way he was able to convince you, if he did convince you, by looking at these different exhibits, that his opinion was sound and reasonable.

The contention of the defendant, as I understand it, with respect to these three earlier applications, is that the Government has failed to substantiate its case beyond a reasonable doubt. If you find that the statement in the 1934 passport was knowingly false, you will then come to the question whether the 1934 passport as renewed in 1937 was

Charge of the Court.

883

wilfully and knowingly used by the defendant, on either or on both of these two occasions when it is alleged in the indictment it was used, namely, on April 30, 1937, and again on February 15, 1938.

The testimony on this branch of the case was that the defendant arrived at the Port of New York from abroad on April 30, 1937, on the steamship Berengaria, and again on February 15, 1938, on the steamship Aquitania; and further that on each of these occasions he presented the 1934 passport to the immigration authorities and that they stamped the passport accordingly.

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The indictment in this case is not evidence. It is a mere accusation or a charge to define the issues in the case and to bring the defendant into court.

The Court's rulings during the course of the trial are of no particular concern of the jury. They were made on questions of law and should not influence you one way or the other insofar as the issue which you are to determine is concerned. The defendant is presumed innocent until he has been proved guilty beyond a reasonable doubt and that presumption or shield of innocence follows him throughout the entire trial until it is overcome by evidence satisfactory to you that he is guilty beyond a reasonable doubt.

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Reasonable doubt is nothing more than a doubt based on reason or one which may be discussed and supported by argument and discussion. It is neither a capricious nor an arbitrary doubt, nor is it one which is engendered by a natural reluctance which most people have to perform an unpleasant or a difficult task.

The failure of the defendant to take the witness stand and testify in his own behalf does not create any presumption against him, and the jury must not permit that fact to weigh in the slightest degree against him, nor should that fact enter into the discussions or deliberations of the jury in any manner.

886

Additional Requests With Reference to Charges.

The jury is the sole judge of the facts and the inferences to be drawn from the facts, and of the credibility of the witnesses. And if you find that I have misstated or misquoted any fact, you will disregard entirely what I have stated to you and abide solely by your own recollection.

If you find that any witness has wilfully given false testimony, you are permitted, if you care to do so, to disregard the testimony of such witness entirely.

Your verdict in this case may be either guilty or not guilty on either or both of the two counts in the indictment.

887

Are there any requests to charge and any exceptions to the charge?

And I may say in that connection, I have during the summation had an opportunity to examine somewhat casually the requests to charge submitted to me on behalf of the defendant, and I have indicated in the margin my disposition of those requests respectively, and I will now hand the paper back to Mr. Battle, and if he cares to have me charge any of those requests which have been allowed, I should be very glad to do so, but I think probably that I have covered all of them in the main charge.

888

Mr. Battle: If your Honor please, in view of your Honor's statement to the jury in the charge that it was only necessary for the Government to prove one of the three previous passports charged in the indictment, I respectfully renew my motion that the testimony as to the Dozenberg and Morris applications and passports are immaterial and prejudicial on the ground already stated, and if your Honor adheres to your former ruling, I will respectfully except to your Honor's charging in regard to the Dozenberg and Morris passports and applications.

The Court: Yes.

Mr. Battle: And may I ask if your Honor adheres to your ruling?

The Court: I do.

Mr. Battle: I beg your pardon?

Additional Requests With Reference to Charges.

889

The Court: Yes, I do.

Mr. Battle: If your Honor adheres to your ruling as to the use of the passport as set up in the indictment in respect to my request and motion that your Honor rule that the use set up in the indictment is not within the contemplation of the statute, then I would ask that your Honor submit to the jury in your charge as to whether or not the use set up in the indictment is such a use as is contemplated by the statute.

The Court: No, I will decline to do that.

Mr. Battle: I except. Will you Honor give me just a moment to look over these. I respectfully ask that your Honor read request number 10.

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The Court (reading): "In weighing the testimony and arriving at the verdict, the jury must not be influenced by questions of public interest or public policy, newspaper articles, the effect of their verdict upon other persons charged with crime, whether the verdict would or would not be pleasing to the judge, or any other consideration outside of the evidence in this case."

Mr. Battle: I now ask that your Honor charge number 21.

The Court (reading): "The fact that the defendant arrived into the United States on April 30, 1937, and February 15, 1938, on foreign boats, is of no consequence in determining his right to enter the United States on these occasions."

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Mr. Battle: I will ask that your Honor read 34.

The Court (reading): "The mere fact that the passport was stamped by a Government immigration inspector does not in and of itself constitute a 'use'."

Mr. Battle: Request number 37, if your Honor please.

The Court (reading): "The immigration inspector, Larson, had no right to bar the entry of the defendant into the United States on April 30, 1937."

892

Additional Requests With Reference to Charges.

I think that is quite obvious because of the fact that Inspector Larson never claimed that he had any such right. He is merely there for the purpose of investigating.

Mr. Battle: I will ask your Honor to charge number 38, which is the same statement as the other request, with respect to the witness German.

The Court (reading): "The immigration inspector, German, had no right to bar the entry of the defendant into the United States on February 15, 1938."

893 And I make the same comment with respect to that as I did with respect to the other.

Mr. Battle: And I ask your Honor to charge 41.

The Court (reading): "You are not permitted to infer from the fact that the defendant used the passport or may have used the passport in his travels abroad, that he therefore violated the law. You must limit your consideration solely and exclusively to the presentation of the passport to the American immigration officers in the Port of New York on the specific days mentioned in the indictment, that is April 30, 1937, and February 15, 1938."

894 And I assume by the use of the words "presentation of the passport to the American immigration officers," that that comprehends the entire incident, the submission not to a particular person but to all the officials at that time or those times respectively.

Mr. Battle: And then, if your Honor please, opposite the requests 45 and 46 there is a question mark, and I ask that your Honor charge those two.

The Court: I will charge the first part of number 45, namely "The defendant is not here on trial for obtaining passports under the names of Dozenberg, Morris or Richards, in 1921, 1927 and 1931 respectively." But as I have already stated in the main charge, he is here for knowingly and wilfully using on these two occasions alleged in the indictment a passport, namely, the one in 1934 alleged to have been secured by reason of false statements.

Additional Requests With Reference to Charges.

895

Mr. Battle: The final sentence there, your Honor?

The Court: I will refuse to charge the last sentence of

45.

Mr. Battle: Will your Honor give me an exception.

Then as to 46, your Honor, I request that that be charged.

The Court (reading): "The defendant is here on trial solely for the alleged use of the passport issued to him on September 1, 1934, under his own name, Earl Russell Browder. You must not be prejudiced by the introduction of the proof concerning Dozenberg, Morris and Richards' passports, as they do not constitute the offenses for which the defendant is not here on trial."

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Mr. Battle: "Is now here on trial."

The Court: Yes. "Those offenses, if there are such under the law, are outlawed by the statute of limitations."

I do not, however, mean by this statement that you should not consider the testimony with respect to the Dozenberg, Morris and Richards' passports insofar as it relates to the issues under the two counts in the indictment which I have already explained to you.

Mr. Battle: Will your Honor give me an exception. Will your Honor also charge number 11.

The Court: Number 11?

Mr. Battle: Yes.

897

The Court (reading): "If the evidence against the defendant is equally consistent with innocence and guilt, the jury must adopt the construction in favor of innocence, and must acquit."

I think I have in substance charged all of that. I am quite certain that Mr. Battle's language is better than mine, but I thought that had in substance been fully covered in the main charge.

Mr. Battle: Will your Honor charge 17 and 20?

The Court: I was wondering if we could not go along in numerical order and perhaps in chronological order, too.

898

Additional Requests With Reference to Charges.

Mr. Battle: This is in numerical order.

The Court: Number 17?

Mr. Battle: Yes, sir.

The Court: (reading): "Mere probabilities or suspicions are not sufficient to warrant a conviction nor is it sufficient that the greater weight or preponderance of the evidence supports the allegations of an indictment, nor is it sufficient that upon the doctrine of chances it is more probable that the defendant is guilty than innocent. The jury are not concerned with probabilities, but only with evidence and with the issues in this case."

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Mr. Battle: Then, finally, number 20, your Honor.

The Court: (reading): "I charge you as a matter of law that a native-born American citizen, as the defendant herein is conceded to be, has an absolute right to enter or leave this country without a passport," but must show he is an American citizen. And I suppose too, that he is subject to any reasonable regulations that may have been promulgated with respect to his admission and leaving the country provided they were duly authorized by law.

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Mr. Battle: Will you Honor give me an exception to each of the requests which your Honor declined or refused to charge?

The Court: Certainly. Is there anything further?

Mr. Cahill: I have nothing, your Honor.

The Court: I am going to excuse Mr. Weir, juror number 13. I am sorry you are not going to be with us any longer.

(Marshals sworn.)

The Court: If the jury wishes any and/or all of the exhibits, all you have to do is to send for them.

(The jury retired at 3:07 p. m.)

Verdict.

901

(The jury returned at 3:50 p. m.)

The Clerk: Mr. Foreman and members of the jury, have you agreed upon a verdict?

The Foreman: We have, sir.

The Clerk: How say you?

The Foreman: Guilty as charged on both counts.

Mr. Battle: I ask that the jury be polled.

(Jury polled.)

Mr. Battle: If your Honor please, I ask permission to reserve any motions—

The Court: No, I think you should make them now and we will dispose of this case immediately.

902

Mr. Battle: I ask your Honor, when will you set the case down for sentence?

The Court: Now.

Mr. Cahill: The Government moves for sentence.

Mr. Battle: Pardon me a moment, please. If your Honor please, I will move for an arrest of judgment and for a new trial on all the motions made and objections taken—the motions made at the opening and during the trial and at the close of the case for the Government and at the close of the entire case after the defendant rested, and on each and every one of those motions and each and every objection made and exception taken; and I also move to set aside the verdict and for a new trial on the ground that it is contrary to law, contrary to the evidence, and to the weight of the evidence.

903

The Court: I will deny your motion. I think the verdict of the jury is the only one possible on the evidence. I am not in the habit of thanking the jury for what I conceive to be their duty as citizens of the United States, but I think they are entitled to praise for the way they have courageously and fearlessly and determinedly rendered this verdict.

Mr. Battle: Your Honor will give me an exception.

Verdict.

The Court: Yes.

The Clerk: Shall I excuse the jury, your Honor?

The Court: The jury can stay if they wish to. Mr. Cahill has moved for sentence. I would like to have the defendant stand and come up to the bar, and I ask if there is anything that he or his counsel wishes to say at this time.

Mr. Battle: If your Honor please, I have already made the motions indicated and take my exception.

The Court: Have you anything to say, Mr. Cahill, or do you wish to make a recommendation to the Court with respect to sentence?

905 Mr. Cahill: Yes, your Honor. I think I should call your Honor's attention to the fact that this defendant has previously been in difficulties with the law, having served a term or terms of imprisonment in the Federal Penitentiary at Leavenworth in connection with an indictment charging a conspiracy to obstruct the administration of the Selective Service Law in 1917.

906 In respect to the Government's recommendation as to sentence, I call the Court's attention to the fact that the penalty provided, the maximum penalty provided for each violation of the section here charged is five years and \$2,000 fine. I have no intention of going over the evidence in this case again, but it does seem to me that in addition to the violation of the passport law, that the concomitant violations of perjury and trifling and tampering with the vital statistics of our country should be taken into account. It is therefore the recommendation of the Government that a total sentence of five years and a fine of \$2,000 be imposed.

The Court: Is there anything that you wish to say?

Mr. Battle: Your Honor is familiar with all the facts. You heard all the evidence, and I submit it to your Honor.

The Court: I will impose a sentence on the defendant of two years and one thousand dollars (\$1,000) on each of the two counts of the indictment, to run consecutively.

Now, is there any question with respect to appeal or bail?

Mr. Battle: Yes, sir. If your Honor please, I am going to move for an arrest of judgment and I ask that the defendant be admitted to bail pending an appeal.

In that respect I will say, as your Honor probably knows, the defendant has been on bail for a number of months.

The Court: What is the bail at the present time?

Mr. Battle: \$7,500. He has been, with the knowledge of the District Attorney, out of the State on a number of occasions, and has always returned, and I can give your Honor my personal assurance that I am confident he will be here to answer to—

908

Mr. Cahill: I raise no question as to the adequacy of the amount. Having regard, however, to the rules of the Supreme Court, I do not feel on behalf of the Government that there is a substantial question involved within the meaning of the rules. However, the granting of bail is discretionary with your Honor, and that is my position.

The Court: I am frank to say, Mr. Battle, that on the evidence that I have heard, that I have considerable difficulty in finding any substantial question that could be urged on an appeal from this judgment. But in view of the statement that you have made that you intend to take an appeal and that there may be some question which can be argued in a higher court, I am disposed to allow the defendant to go out on bail at \$7,500, the bail which I understand he is now on.

909

Mr. Battle: Yes.

The Court: On the understanding that he will immediately take his appeal and perfect that appeal in accordance with the rules of the Supreme Court in cases of this kind.

Mr. Battle: That will be done, your Honor.

The Court: And I am willing to permit him to surrender on Wednesday of this week.

910

Government's Exhibits.

Mr. Battle: Wednesday of this week, yes, sir. Until then you will—

The Court: In the criminal part on the third floor.

Mr. Battle: Yes.

The Court: And in the meantime you should take your appeal and see that the bail bond is filed and approved.

Mr. Battle: That will be done, your Honor. Thank you.

The Court: I want again—not to thank the jury because I don't think that any of you want any thanks for serving as jurors in this case, but I think you have done your

911 full duty and I think you have done it promptly.

GOVERNMENT'S EXHIBITS.

Government's Exhibit 1 for Identification.

(Is the same as Government's Exhibit 16 in evidence.)

Government's Exhibit 1a for Identification.

912

(Is the same as Government's Exhibit 16a in evidence.)

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145182

PASSPORT APPLICATION

[FORM FOR NATIVE CITIZEN]

Edition of 1934

PASSPORT
ISSUED

SEP 1 1934

130

BROWDER
EHRLE
RUSSELL

(To be printed in full by applicant for passport)

Passport No.

Seen and (and born) corrected

The legal fee for a passport is nine dollars in currency and one dollar for execution of the passport.

No total fee is \$10.00. It is unnecessary to pay any other fee to any person in connection with the filing out or execution of this application or for obtaining the passport. The clerk of court or Passport Agent before whom this application is executed will give the applicant all necessary information and guidance.

UNITED STATES OF AMERICA
STATE OF NEW YORK
COUNTY OF NEW YORK

I, E. Russell Browder, a NATIVE CITIZEN of the UNITED STATES, hereby apply

to the Department of State, at Washington, for a passport. I solemnly swear that I was born at Wichita

Kansas, on May 20, 1891, that I was never married married on (A woman must insert date of such marriage)

that my father Wm Browder was born at Kentucky

and is now residing at 1601 N. Howell, Longwood, Mo. (Give present address of deceased give date of death)

(The portion in this block to be filled in only by a person whose father was not born in the United States)

My father emigrated to the United States on or about , resided continuously in the United States from 1 to 1, at , and was naturalized as a citizen of the United States before the Court of at (City and State) (Name of court) (District, State, county) (Month) (Day) (Year)

I am domiciled in the United States, my permanent residence being at 2714 Wallace Ave. in the city of New York, State of New York

I have not taken an oath of allegiance to, or been naturalized as a citizen or subject of any foreign State. (If applicant took oath of allegiance to, or was naturalized in a foreign State, a supplementary statement, under oath, should be attached)

(The portion in this block to be filled in by a woman who is married to an alien and by a person whose father was not born in the United States)

I have resided outside the United States at the following places for the following periods (Name each country and length of stay in each)

from to (Departure from U.S.)
from to (Return to U.S.)
(Names of countries) (Relative as witness appears in application for citizenship)

My last passport was obtained from on (Date) and is submitted herewith for cancellation. (Insert name, title or position of officer, agent)

I am about to go abroad temporarily and intend to return to the United States within six months. (Give disposition of passport if it cannot be submitted)

(Name countries to be visited)

(Object of visit)

who was born at on (Date) (Place and State or country)

to whom I was married on and whose photographic likeness is attached hereto. (Date of marriage)

Her present address is (Country)

PORTION IN THIS BLOCK MUST BE FILLED IN ON OR AFTER SEPTEMBER 22, 1932

My (wife's) maiden name was Wade Russell Browder, and (I) (she) was was not previously married on (Date of previous marriage)
My (her) former husband, was born at (City and State or country) (Date)
 (Name of former husband) (Date)
 (Name of former husband) (Date)

[My wife emigrated to the United States on or about and (her father) (her former husband)

was naturalized as a citizen of the United States before the Court of at on (City and State) (Month) (Day) (Year)

as shown by the accompanying Certificate of Naturalization. Since naturalization she has resided abroad at the following places for the following periods: (Name each country visited and the length of stay in each)

PORTION IN THIS BLOCK MUST BE FILLED IN BY MARITIME PASSAGE ON OR AFTER SEPTEMBER 22, 1922

My (wife's) maiden name was _____, and (I) (she) {was
was not
previously married on _____
My } former husband,
Her } _____, was born
at _____, (City and State of _____)
(Date)

AMENDED
WARRANT OF ARREST
FOR THE STATE OF TENNESSEE
IN REPLY TO A WRIT OF HABEAS CORPUS
ISSUED BY THE SUPREME COURT OF THE UNITED STATES
AT MEMPHIS, TENNESSEE
R. B. SEARLEY
CLERK OF THE DISTRICT COURT
U. S. DEPT. OF JUSTICE

(My wife emigrated to the United States on or about and (her father) (her former husband)

was naturalized as a citizen of the United States before the _____ Court of
(Portion in brackets not to be filled in if wife claims citizenship through birth in the United States)

as shown by the accompanying Certificate of Naturalization. Since naturalization she has resided abroad at the following places for the following periods: (Name each country visited and the length of stay in each)

from _____
(Departure from U.S.)
from _____

(Name of country visited) USA FILE REC'D
(Return to U.S.)
 I request that my passport include my minor children as follows whose photographic image is attached hereto:
 _____, born at _____ on _____, residing at _____
 _____, born at _____ on _____, residing at _____
 _____, born at _____ on _____, residing at _____
 (Name in full) _____ (Place and State or country) _____ (Date) _____

1-1200

1000 fee received by

[OVER]

I solemnly swear that the statements made on both sides of this application are true and that the photograph attached hereto is a likeness of me.

OATH OF ALLEGIANCE



I solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely, without any mental reservation or purpose of evasion: So help me God.

Sworn to before me this UG day

(Signature of applicant)

SEAL OF
PASSPORT
AGENCY

of

19

N.Y.

Agent of the Department of State

DESCRIPTION OF APPLICANT

Height 5 feet, 7 inches. Age 43 years.

Hair Brown

Eyes Blue

Distinguishing marks or features None

(Note any facial marks or scars by which applicant may be identified)

Place of birth Wichita Kansas

(City and State)

Date of birth May 20, 1891

(Month, day, and year)

Occupation Journalist

I intend to leave the United States from the port of New York

(Port of departure)

sailing on board the El de France

(Name of ship)

on

Sept. 8

(Date of departure)

1924

ADDRESS

I request that my passport be mailed to the following address:

Name

Number and Street

City and State

(Note.—A passport will not be mailed to a hotel address unless the hotel is the applicant's place of permanent residence.)

AFFIDAVIT OF IDENTIFYING WITNESS

I, the undersigned, solemnly swear that I am a citizen of the United States; that I reside at the address written below my signature hereto affixed; that I know the applicant who executed the affidavit hereinbefore set forth to be a citizen of the United States; that the statements made in the applicant's affidavit are true to the best of my knowledge and belief; further,

I solemnly swear that I have known the applicant personally for 39 years.

If witness has been issued a passport, give number and date of issue or approximate date of issue.

No. Date of issue

No lawyer or other person will be accepted as witness to a passport application if he has received or expects to receive a fee for his services in connection with the execution of the application or obtaining the passport.

Sworn to before me this 31 day

of

19

James H. Browder
Agent of the Department of State



Signature should not be affixed until requested by an appropriate official of the Passport Agency.

Signature should not be affixed until requested by an appropriate official of the Passport Agency.

I solemnly swear that I have known the applicant personally for 39 years.

If witness has been issued a passport, give number and date of issue or approximate date of issue.

No. _____ Date of issue _____

No lawyer or other person will be accepted as witness to a passport application if he has received or expects to receive a fee for his services in connection with the execution of the application or obtaining the passport.

"Sworn to before me this _____ day

of _____ 19____

James H. [Signature]
Agent of the Department of State.



"This document will not be valid unless executed before an agent of the Department of State, or a clerk of a Federal court or a State court having jurisdiction."

PLEASE NOTE.—As the Department of State will not upon this application promptly, inquiry concerning it should be made only in case of emergency.



Two photographs (duplicates) are required; one to be attached to the application in the space designated above, and the other, bearing the signature of the applicant, to accompany the application unattached. A group photograph should be used if more than one person is to be included in the passport. Photographs must be on thin paper, should have a light background and be not over 3 by 3 inches nor less than 2½ by 2½ inches in size.



Signature should not be affixed until requested by appropriate official of the Passport Agency.

EXHIBIT "A" (p. 2)

GOVERNMENT EXHIBIT 3.

DEPARTMENT OF STATE

Renewal Series No.

Passport No.

Issued on

Issued at

Washington, D. C.

210

451933

Nov. 19, 1931

APPLICATION FOR RENEWAL OF PASSPORT

In conformity with the Rules and Regulations prescribed by the President and the Secretary of State, pursuant to law, I, the undersigned, hereby apply for a renewal of the period of validity of my passport, the number and date of which appear above:

I hereby declare that—

(Use one of the two following lines, striking out the other.)

I was born in the United States.

~~I was born in _____ and (if my father) was naturalized in the year _____~~

(Insert name of country if born abroad)

(If not a citizen of the United States)

(This section must be filled in by all women, and by all those men whose passports bear the names of their wives.)

I was { never married. } My { wife } was born in { the United States. }

(Strike out the four following lines if never married)

(Strike out above if never married)

(Insert name of country if born abroad)

and { was naturalized in the year _____ }
 { is an alien, a citizen of _____ }

(Strike out one of the above two lines)

Our marital status { has not been terminated. }

{ was terminated by (death) (divorce) in the year _____ }

(Strike out one of the above two lines)

(Date)

(This section must be filled in when the record in the preceding section shows that marriage occurred on or after September 22, 1922. A record of a man's previous marriage is not required.)

(Use one of the two following lines, striking out the other)

I (My wife) { was not previously married. }
 { was married to former husband on _____ }

(Strike out the three following lines if not previously married)

He was born in { the United States. }

(Insert name of country if born abroad)

and { was naturalized in _____ }

(Insert date of naturalization)

{ is an alien, a citizen of _____ }

(Name of country)

The marital status was terminated by (death) (divorce) on _____

(Date)

(This section must be filled in by all persons who have acquired citizenship through marriage or naturalization and by an American woman who has been married to an alien.)

Since my present passport was issued I have been outside of the United States at the following places for the periods stated:

from _____ to _____
 from _____ to _____
 from _____ to _____

The purposes of my visits to the foregoing countries were as follows (give reason or reasons for stay in each country named):

EXHIBIT
 U. S. Dist. Court
 S. D. of N. Y.

RICHARDS
 ALBERT
 HENRY

(This section must be filled in by all persons who have acquired citizenship through marriage or naturalization and by an American woman who has been married to an alien.)

Since my present passport was issued I have been outside of the United States at the following places for the periods stated:

from _____ to _____
from _____ to _____
from _____ to _____

The purposes of my visits to the foregoing countries were as follows (give reason or reasons for stay in each country named):

EXHIBIT
U. S. Dist. Court
S. D. of N. Y.

DO NOT USE THIS SPACE

Application and passport submitted for Department's consideration
by _____ Agency, on _____
(Initials of agency) (Date)

Issued by Chgo Agency, on Nov 2 1933
(Initials of agency) (Date)

For one years from 1933 to 1935
(two) (date of expiration)

Until the 19th day of Nov, 1935
(date when passport is being renewed)

\$5.00 fee received by

(attached to passport)
deposited by agency.

RECEIVED
NOV 13 1933

5035

Government Exhibit 3. Page 2.

I am domiciled in the United States, and at present am in the United States, residing (together with those whose names appear in my passport) at 2515 W. Halsted St. City of Chicago,
(Street address)
 State of Illinois

I intend to leave the United States from the port of New York,
(Port of departure)
 sailing on board the _____, on _____, 193
(Name of ship) (Date of departure)

(Signature) Albert H. Richards
(I hereby declare that I personally affixed my signature appearing above)

Please mail passport to {above following} address:

Street _____

City _____

State _____

(Do not use the following lines)

REMARKS: _____

Agent of the Department of State.

3/2

GOVERNMENT EXHIBIT 3A.

PASSPORT APPLICATION

451933

[FORM FOR NATIVE CITIZEN]

EDITION OF 1931

The legal fee for a passport is five dollars, in currency, and one dollar for execution of the passport. It is unnecessary to pay any other fee to any person in connection with the filing of or execution of this application or for obtaining the passport. The clerk of court or Passport Agent before whom this application is executed will give the applicant all necessary information and guidance.

UNITED STATES OF AMERICA
STATE OF NEW YORK
COUNTY OF NEW YORK

I, Albert Henry Richards, a NATIVE CITIZEN OF THE UNITED STATES, hereby apply
(Name in full)

to the Department of State, at Washington, for a passport. I solemnly swear that I was born at Deshkesh
(See footnote) (City or town)

Wisconsin, on Sept. 4, 1895, that I was never married
(State) (Date) (A woman must insert date of each marriage)

that my father, Richard H. Richards was born at Milwaukee Wisc.
(A woman who has been married must insert husband's name) (City or town) (State or country)

and is now residing at Deceased January 1907
(Give present address. If deceased, give date of death)

(The portion in this block to be filled in only by a person whose father was not born in the United States)

My father emigrated to the United States on or about _____ and resided continuously
in the United States from 1 _____ to 1 _____, at _____ and was naturalized as a
citizen of the United States before the _____ Court of _____
(Name of court) (District, State, county)
at _____ on _____
(City and State) (Month) (Day) (Year)

I am domiciled in the United States, my permanent residence being at Arbutus Road
(Street address)
in the city of Huguenot Park, Staten Island, N. Y.

(The portion in this block to be filled in by a woman who is married to an alien and by a person whose father was not born in the United States)
I have resided outside the United States at the following places for the following periods:
(Name each country and length of stay in each)

_____ from _____ (Departure from U. S.)
_____ from _____ to _____ (Return to U. S.)
(Names of countries)

My last passport was obtained from none on _____
(Washington or location of office abroad) (Date)
and is submitted herewith for cancellation

I am about to go abroad temporarily and intend to return to the United States within _____
purpose of residing and performing the duties of citizenship therein.

I desire a passport for use in visiting the countries hereinafter named for the following purpose:

France, Germany, tourist

(Do not state all countries)

I request that my passport include my wife _____, who was born
(See footnote) (Name in full)

at _____ on _____, and to whom I was married
(Place and State or country) (Date)

on _____ Her present address is _____
(Date of marriage) (City) (State) (Country)

PORTION IN THIS BLOCK MUST BE FILLED IN IF MARRIAGE TOOK PLACE ON OR AFTER SEPTEMBER 22, 1922

My wife's maiden name was _____, and _____
previously married on _____
(Date of each previous marriage)

Her former husband's full name of former husband _____
at _____ he died _____
(City and State or country) (they were divorced) on _____

[My wife emigrated to the United States on or about _____ and (her father) (her former husband)
was naturalized as a citizen of the United States before the _____ Court of _____
(Portion in brackets not to be filled in if wife claims citizenship through birth in the United States)

130 RICHARDS ALBERT HENRY
(Surname) (First name) (Middle name)
(To be printed in full by applicant for passport)

Passport No. _____

Seen and (and born) certified _____

BIRTH CERTIFICATE SE.

FILED
NOV 20 1931

U.S.
G.
JA

Her former husband's full name of former husband
at _____, and { he died } on _____
(City and State or country) { they were divorced } (Date)

[My wife emigrated to the United States on or about _____ and (her father) (her former husband)
was naturalized as a citizen of the United States before the _____ Court of
(Portion in brackets not to be filled in if wife claims citizenship through birth in the United States)
at _____ on _____
(City and State) (Month) (Day) (Year)
as shown by the accompanying Certificate of Naturalization. Since naturalization she has resided abroad at the following
places for the following periods: (Name each country visited and the length of stay in each)

_____, from _____ to _____
(Names of countries visited) (Departure from U. S.) (Return to U. S.)
_____, from _____ to _____

I request that my passport include my minor children as follows:

_____, born at _____ on _____, residing at _____
_____, born at _____ on _____, residing at _____
_____, born at _____ on _____, residing at _____
(Name in full) (Place and State or country) (Date)

I solemnly swear that the statements herein made are true.

See received by _____

FEE RECEIVED NOV 19 1931

39955

Government Exhibit 3A Page 2.

Further, I do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely, without any mental reservation or purpose of evasion: So help me God.

Albert H. Richards
(Signature of Applicant)

before me this NOV 18 1931 day



Frank Ealey
Agent of the Department of State.

DESCRIPTION OF APPLICANT

Height 5 feet, 7 inches. Age 36 years.

Hair brown Eyes blue

Distinguishing marks or features none
(Note any facial marks or scars by which applicant may be identified)

Place of birth Oshkosh, Wis. Date of birth Sept. 4, 1895
(City and State) (Month, day, and year)

Occupation Musician

I intend to leave the United States from the port of New York
(Port of departure)

sailing on board the Rotterdam on Nov 20, 1931
(Name of ship) (Date of departure)

ADDRESS

I request that my passport be mailed to the following address:

Name _____

No. and Street _____

City and State _____

[Note.—A passport will not be mailed to a local address unless the hotel is the applicant's place of permanent residence.]

BW

AFFIDAVIT OF IDENTIFYING WITNESS

I, the undersigned, solemnly swear that I am a citizen of the United States; that I reside at the address written below my signature herein; that I know the applicant who executed the affidavit hereinbefore set forth to be a citizen of the United States; that the statements made in the applicant's affidavit are true to the best of my knowledge and belief; further,

I solemnly swear that I have known the applicant personally for 7 years.

(If lawyer or other person will be accepted as witness to a passport application if he has received or expects to receive a fee for his services in connection with the execution of the application or obtaining the passport.)

Beatrice Oberlander
(Name of witness)
145 West 71st St., N.Y.C.
(Residence address of witness)

* Sworn to before me this NOV 18 1931 day

Frank Ealey
Agent of the Department of State.



GOVERNMENT EXHIBIT 4.

The original and each copy of an application for a passport must have attached to it a copy of the applicant's photograph.
A loose, signed photograph of the applicant must accompany the application.
The photographs must be on thin paper, should have a light background, and be not less than three inches in size.

Fee for passport, one dollar.
Fee for executing application, one dollar.

[Edition of 1918.]

[FORM FOR NATURALIZED CITIZEN.]

UNITED STATES OF AMERICA,
STATE OF NEW YORK,
COUNTY OF NEW YORK.

I, Nicholas Dozenberg, a NATURALIZED AND LOYAL CITIZEN
OF THE UNITED STATES, hereby apply to the Department of State, at Washington, for a passport,
accompanied by my wife,

(Name and place of birth.)

I solemnly swear that I was born at Riga, Russia now Latvia
on Nov. 15, 1882; that I emigrated to the United States, sailing from

Stockholm about June 1904; that I resided 16
years, uninterruptedly, in the United States, from 1904 to 1921 at Boston, Mass.
and New York, N.Y.; that I was naturalized a citizen of the United States before the

District of the United States
at Boston, Mass. February 6, 1911,
as shown by the Certificate of Naturalization, with which I am the IDENTICAL PERSON
described in said Certificate; that I have resided in the United States since my naturalization at
the following places for the following periods:

None

that I am domiciled in the United States, my permanent residence being at 1309 Tremont
Rochury Boston, in the State of Massachusetts, where I follow the
occupation of machinist; that I am about to go abroad temporarily, and

intend to return to the United States within three (months) with the purpose of
residing and performing the duties of citizenship therein; and that I desire a passport for use in visiting
the countries hereinafter named for the following purpose:

Latvia

(Name of country.)

Estonia

(Name of country.)

British Isles, Denmark, Sweden

(Name of country.)

Temporary stay for visit friends

(Object of visit.)

Disposal of property in Latvia

(Object of visit.)

Travel

(Object of visit.)

I intend to leave the United States from the port of New York

sailing on board the Hellis Olaf on March 17, 1921

WASHINGTON

ISSUED

APR 12 1921

PASSPORT

DEPT. OF STATE

Latvia
(Name of country.)
British Isles, Denmark, Sweden
(Name of country.)
Temporary stop for next friends
(Object of visit.)
Disposal of property, settle estate.
(Object of visit.)
Travel
(Object of visit.)

I intend to leave the United States from the port of *New York*
(Port of departure.)
sailing on board the *Ulling Out* on *March 17*, 192*1*
(Name of vessel.) (Date of departure.)
My last passport was obtained from *none* on _____
and was _____
(Disposition of passport.)

OATH OF ALLEGIANCE.

Further, I do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely, without any mental reservation or purpose of evasion; So help me God.

Nicholas Dozenberg
(Signature of applicant.)
MAR 11 1921

Sworn to before me this *MAR 8 - 1921* day
of _____, 19____

[SEAL OF
PASSPORT AGENCY.]

Philip H. Ahren
Agent, Department of State.

[OVER.]

CLP

Government Exhibit 4. Page 2.

DESCRIPTION OF APPLICANT.

(38)
 Age: 30 years
 Stature: 5 feet 8 1/2 inches, Eng.
 Forehead: medium
 Eyes: Blue
 Nose: medium
 Distinguishing marks: none
 Mouth: mounted
 Chin: medium
 Hair: brown
 Complexion: fair
 Face: spare

AFFIDAVIT OF IDENTIFYING WITNESS.

I, Katherine Dozenberg, solemnly swear that I am a ^{native} naturalized citizen of the United States; that I reside at 1309 Tremont Street Roxbury Boston; that I have known the above-named Nicholas Dozenberg personally for eleven (11) years and know ^{him} to be the identical person referred to in the within-described certificate of naturalization, and that the facts stated in ^{his} affidavit are true to the best of my knowledge and belief

Katherine Dozenberg
 House keeper

(Firm, corporation, or organization, if any.)

(Business or professional address.)

Sworn to before me this 24th day of 8-1914

[SEAL]

Philip W. Cohen
 Passport Agent, Department of State.

Applicant desires passport to be sent to the following address:

Send to Nicholas Dozenberg
 Passport Agent, M. Stein, 271 E. 14th St.
 Custom House New York City.

A second duplicate of the photograph to be attached hereto must be sent to the Department with the application to be affixed to the passport with an impression of the Department's seal.

A second duplicate of the photograph to be attached
hereto must be sent to the Department with the applica-
tion to be affixed to the passport with an impression of the
Department's seal.



4/2

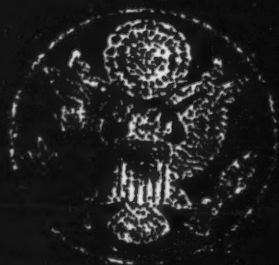
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313

GOVERNMENT EXHIBIT 5.

No 145182

PASSPORT



UNITED STATES OF AMERICA

BLANK PAGE

314

Government's Exhibit 5, Page 2.

PRESENT THIS PASSPORT WITH YOUR APPLICATION FOR A NEW PASSPORT

IMPORTANT

The person to whom this passport is issued must sign his name on page three immediately on its receipt. The passport is **NOT VALID** unless it has been signed.

The bearer should also fill in blanks below as indicated.

Signature of bearer

Bearer's address in the United States

Bearer's foreign address

IN CASE OF DEATH OR ACCIDENT NOTIFY

Name of person to be notified

Exact address

CAUTION

This passport is a valuable document. It should not be altered in any way. Due care should be taken to see that it does not pass into the possession of an unauthorized person. If it is lost or destroyed the fact and circumstances of the loss should be immediately reported to the Passport Division, Department of State, or to the nearest American Consulate, or, in an outlying possession of the United States, to the civil authority thereof, and to the local police authorities. New passports in such cases can be issued only after exhaustive inquiry.

NO 145182

Passport

United States of America
Department of State



L. J. W. J.

10-2-81 72

BLANK PAGE

I, the undersigned, Secretary of State
of the United States of America, hereby
request all whom it may concern to per-
mit safely and freely to pass, and in case
of need to give all lawful aid and protec-
tion to

EARL RUSSELL BROWDER

a citizen of the United States.

The bearer is accompanied by his

Wife XXX
Minor children XXX
XXX
XXX

Should mention my
name and the
name of the
Department of
State

137 131

Description of bearer 12

Height 5 feet 7 inches

Hair BROWN

Eyes BLUE

Distinguishing marks or features

XXX
XXX
XXX

Place of birth WICHITA,
KANSAS

Date of birth MAY 20, 1891

Occupation JOURNALIST

XXX
XXX

Earl Russell Browder
Signature of bearer

This document is not valid unless signed by the
bearer in whose name it was issued

BLANK PAGE

Photograph of bearer

Charles Russell Brender



ATTACHED
OF STATE
WASHINGTON



This passport is good for travel in all countries unless otherwise limited.

This passport is valid for two years from the date of issue unless limited to a shorter period.

This passport is valid for travel in
SPAIN



Note Renewal on page 6



BLANK PAGE

*Amendments and extensions*DEPARTMENT OF STATE
PASSPORT AGENCY

NEW YORK

NO.

40111

RENEWED

B 2 - 1937

EXPIRES

April 1, 1938

BY AUTHORITY OF THE SECRETARY OF STATE

IRA F. MOY

PASSPORT AGENT

Chas. W. Mason

NOVEMBER 26, 1937.

THIS PASSPORT IS AMENDED

READ: THE BEARER OF THIS
PASSPORT IS A NEWSPAPER CORRESPONDENT
ONLY ASSIGNED TO SPAIN
AND HIS PASSPORT IS THEREFORE
VALID FOR TRAVEL IN THAT
COUNTRY.

R. B. ...
SHEPHERD, PASSPORT AGENT

*Kia**1-10-1937**504**E. A. Sigmund*

Name des ...

An ...

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12-10-1937
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DETROIT
16 SEP 1934
PRIJEZ

DEPARTMENT OF STATE
WASHINGTON

American citizens
traveling in disturbed
areas of the world are
requested to keep in
touch with the nearest
American Diplomatic or
Consular Officers.

AMERICAN CONSUL GENERAL
PARIS OFFICE

December 21-1934
Paris
1934

of America at Paris, France

Carl R. Bratton

Transit VISA

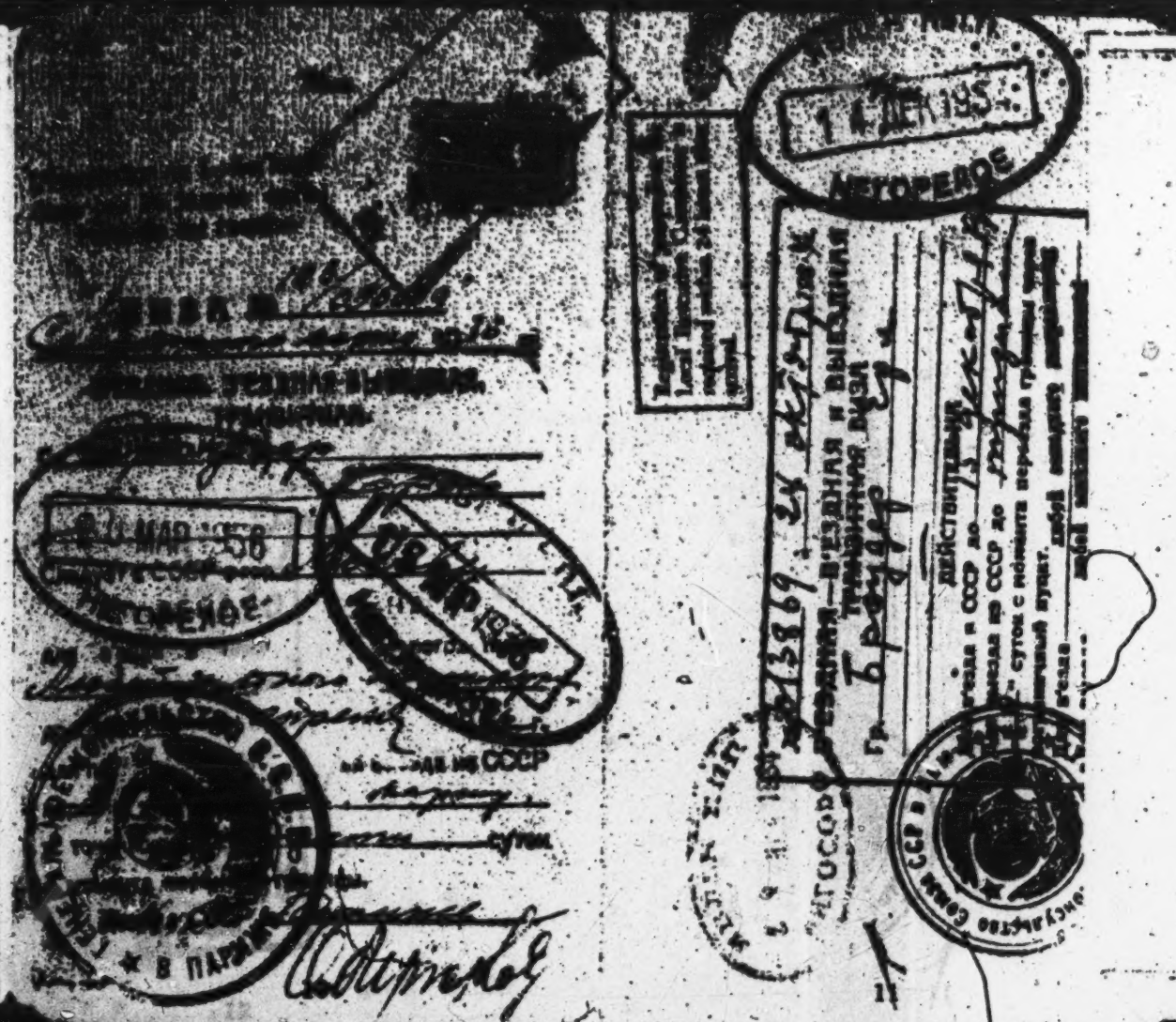
Issued to: Carl R. Bratton
atgal to: Paris, France
For: journeys to Lithuania
and back with right to stop over
in Lithuania 4 days each time.
Expires: 1934-12-24
Valid from: 1934-12-24
to: 1934-12-24
Keitones titulas: Transit
Object of journey: New York 1004-X mtr. 1d

P. DANEVICH
Lithuanian Consul General
Paris



ETROU
6 VII. 1934
ODJEZNA

This additional sheet forms a part of Passport
No. 145182
Issued September 1, 1934



This additional sheet forms a part of Passport
No. 145182
Issued September 1, 1934



LOUI CARROLL
DONALD ERICARDO

EL CONSUMO GENERAL

Handwritten:

СЪДЪЖАНИЕТО НА ТЪЖНАТА

№ 1230
ЗАПИСНОК
1. АИО Исследования
2. Время 10:00-12:00
3. Место ССР
19.08.41
1. 10
2. 10
3. 10

Two Soviet military identification tags (dog tags) are shown. The left tag is for Nikolay P.F. Stolpor, born 1915, with a handwritten '5' and 'Vik 1935'. The right tag is for Nikolay P.F. Stolpach, born 1914, with a handwritten '1411'. Both tags are marked 'Komsomol' and 'Komsomolnik'.

Konsulat R. P.
w New Yorku

Pobres

WIZA PRZEJAZDOWA N

4366.

Johnstonbury [unclear] 1705/12/20

Wzrostem dozwolony w tym celu przejechać w Pociągach Przejazdowych od dnia 1.10.1934 r. do 31.10.1934 r. Wzrostem dozwolony w tym celu przejechać w Pociągach Przejazdowych od dnia 1.10.1934 r. do 31.10.1934 r.

ZA KONSULA GENERALNA



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EMBARQUEMENT

6 DEC 32

DEBARQUEMENT

14 NOV 1934

DEPTOVICE
11.1.35
OAIJED

EMBARQUEMENT
15 NOV 1934
Commissariat
LE HAVRE

VISA valable pour la durée
du présent passeport et un
maximum de deux ans.
Le titulaire a déclaré ne
pas se rendre en France pour
y occuper un emploi salarié.

New York, le 25 OCT 1934

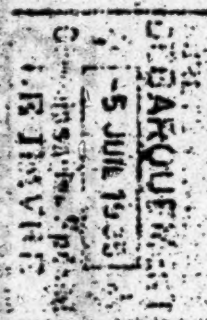
Pr. le Consul Général, D. O.



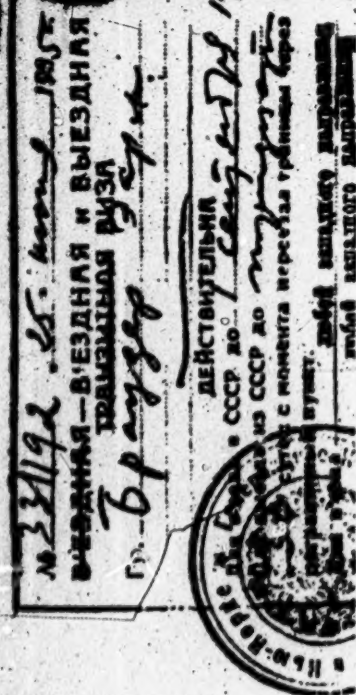
EMBARQUEMENT
12 NOV 1934
LE HAVRE

OUT. A. No 186
ETIENNE L. S.
F. o. P. ados
PECC. 331

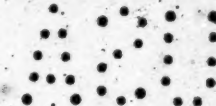
Visa



Register this passport at the
Local Executive Committee is
required within 24 hours after
arrival.

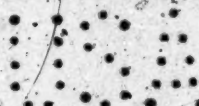


This additional sheet forms a part of Passport
No. 145182
Issued September 1, 1934



Visa

Visa



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BRACLAJ
18 N 1938
OBJEZO

HEIOPEROV

IN IV. AV
OD...

CEM...
VU A L E...
LI-25...

LA KONSUL GENERALNY

26. 10. 1938

WIZA PRZEJAZDOWA

Przejazd do...

Wizy...

Do...

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Government Exhibit 5. Page 14.

Kiss

ÖSTERREICH

AUS 18 1937
AUS 13 APR 37

L. K. P. C.

Gebühr \$2.

ÖSTERREICH
HN: 14 MZ 7
FELDKIRCHÖSTERREICH
- 1.1.1937
FELDKIRCH

24

OR. 18.12.1937
18.12.1937
G. K. P. C.

VISA valable pour la durée
du présent passeport et un
maximum de deux ans.
Le titulaire a déclaré ne
pas se rendre en France pour
y occuper un emploi

New York, le 26 FEB 1937

Pr. le Consul Général, p. o.

COMMISSARIAT-SPECIAL
EMBARQUEMENT
24 AVR. 1937
CHERBOURG

ARTICLE: 79
PERÇU \$2.25

COMMISSARIAT SPECI
VU au DÉBARQU
25 MARS 1937
25
CHERBOURG

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Konsulat R.P. w Now Yorku
 Pobrał
 Wiza przejazdowa
 na przejazd do
 w ciągu _____ dni
 od daty wydania wiza może trwać _____ dni
 w każdym razie
 Wina _____ 193____ wyciącie
 Do _____

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Comercio General
de Europa y Puertos
Zona. Primera
PRAT DE L'INDUSTRIAL
FEB 13 1938
SINDECATO

Carta en 550 pte y 1/2 de la zona
de la zona

MINISTERIO DE CONTRATACIONES Y MONEDA

Autorizado para salir de España con

Prat de Industrial
Prat de Industrial
Prat de Industrial
EL INSPECTOR

BANCO DE ESPAÑA
3-1 ENE 1938
CARTAS OFICIALES DE CONTRATACIONES Y MONEDA

Autorizado para salir de España

breve 31 de Enero 1938

El Ministro de la Gobernación

MINISTERIO DE LA GOBERNACION
SALIDA
8 FEB. 1938
LA JUNQUERA
CATALUNYA

Salida con carta civil que
señala por fe y tres do-
lar

Aduana de la Junquera
8 FEB. 1938
ESPAÑA

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DEPARTMENT OF STATE
WASHINGTON

November 26, 1937
(Date)

An additional sheet containing 25 pages has been added to this passport.

BY AUTHORITY OF THE
SECRETARY OF STATE

R. B. SHIPLEY
Chief, Passport Division.

Nath. P. Hibbs

[Handwritten signatures and stamps]

1937

URZED CELNY - STOLPCACH

Zawledeborn... woz... Menedry

1. Walrow... 25/...

[Large handwritten signature]

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ABSTRACTS FROM PASSPORT REGULATIONS

1. Passports are issued in the United States by the Secretary of State, through the Passport Division, Department of State, Washington, D. C. Applications for passports should be made in person to clerks of Federal courts, clerks of State courts having jurisdiction in naturalization matters, or to passport agents of the Department of State. Passport agents of the Department of State are stationed at New York, Boston, New Orleans, Chicago, San Francisco, and the Department of State, Washington, D. C. Applications should be filed from two to four weeks before the passport is required, depending upon the distance from Washington.

2. Americans residing or sojourning abroad should apply for passports through the nearest American consulate.

3. Applications for passports by persons in the Virgin Islands, Hawaii, Puerto Rico, Guam, American Samoa, or the Philippines, should be made to the chief executives of those islands.

4. Under the provisions of the Act of May 16, 1932, American passports are valid for two years from the date of issue unless limited to a shorter period. Such passports may be renewed under regulations prescribed by the Secretary of State for a period not to exceed two years but the final date of expiration shall not be more than four years from the original date of issue.

5. The fee for a passport, including \$1.00 for the execution of the application and \$9.00 for the passport, is \$10.00. The fee for the renewal of a passport is \$5.00.

6. The regulations provide that when the presumption of having ceased to be an American citizen has arisen against a naturalized American citizen under Section 2 of the Act of March 2, 1907, because of protracted foreign residence, his passport shall not be renewed until he shall have submitted to the Department of State or to a diplomatic or consular officer of the United States, evidence showing that the reason for such foreign residence comes within the rules prescribed by the Secretary of State whereunder such presumption may be overcome.

7. Americans making their homes or residing for a prolonged period abroad should register at the nearest American consulate.

DEPARTMENT OF STATE

Renewal Series No. _____

Passport No. 145182Issued on Sept 1, 1934Issued at Washington, D. C.

APPLICATION FOR RENEWAL OF PASSPORT

I, the undersigned, hereby apply for a renewal of the period of validity of my passport, the number and date of which appear above:

I hereby declare that—

(Use one of the two following lines, striking out the other)

I was born in the United States.

I was born in _____ and (I) (my father) was naturalized in the year _____

(Insert name of country if born abroad)

(If naturalized, insert date of naturalization)

I ~~have~~ taken an oath of allegiance to _____ a foreign State.

(If applicant took an oath of allegiance to, or was naturalized in a foreign State, a supplementary statement, under oath, should be attached)

THIS SECTION MUST BE FILLED IN BY ALL WOMEN, AND BY ALL THOSE MEN WHOSE PASSPORTS BEAR THE NAMES OF THEIR WIVES.

I was ☐ never married.I was ☐ married in the year _____My ☐ wife.My ☐ husband.

was born in _____ the United States.

(Strike out above if never married)

(Insert name of country if born abroad)

(Strike out the four following lines if never married)

and ☐ was naturalized in the year _____

is an alien, a citizen of _____

(Fill in appropriate space)

Our marital status ☐ has not been terminated.☐ was terminated by (death) (divorce) in the year _____

(Strike out one of the above two lines)

(Date)

THIS SECTION MUST BE FILLED IN WHEN THE RECORD IN THE PRECEDING SECTION SHOWS THAT MARRIAGE OCCURRED ON OR AFTER SEPTEMBER 21, 1921. (A record of a man's previous marriage is not required.)

(Use one of the two following lines, striking out the other)

I (My wife) ☐ was not previously married.☐ was married to former husband on _____

(Date of each previous marriage)

(Strike out the following lines if not previously married)

He was born in _____ the United States.

and ☐ was naturalized on _____

(Insert date of naturalization)

(Insert name of country if born abroad)

is an alien, a citizen of _____

(Name of country)

The marital status was terminated by (death) (divorce) on _____

(Date)

THIS SECTION MUST BE FILLED IN BY ALL PERSONS WHO HAVE ACQUIRED CITIZENSHIP THROUGH MARRIAGE OR NATURALIZATION.

Since my present passport was issued I have been outside of the United States at the following places for the periods stated:

from _____	to _____
from _____	to _____
from _____	to _____

The purposes of my visits to the foregoing countries were as follows (give reason or reasons for stay in each country named):

(DO NOT USE THIS SPACE)

Application and passport submitted for Department's consideration

by _____ Agency, on _____

(Initials of agency)

(Date)

Agent, Department of State

Renewed by _____

(Initials of agency)

Agency, on _____

(Date)

For _____ years from _____

FEB 2 - 1937

(DO NOT USE THIS SPACE)

FEB -4 1937

BROWDER EARL ROSSELL

0 - app'd 9/1/34 Sec 130 - Johnson Richard cons 6/8/36
 30 - Browder Earl Rosell Refs (1) 4/1/36

130 - appl 9/1/34 Sea
Bo. Brando East

The marital status was terminated by (death) (divorce) on _____ (Date)

THIS SECTION MUST BE FILLED IN BY ALL PERSONS WHO HAVE ACQUIRED CITIZENSHIP THROUGH MARRIAGE OR NATURALIZATION.

Since my present passport was issued I have been outside of the United States at the following places for the periods stated:

from _____ to _____
from _____ to _____
from _____ to _____

The purposes of my visits to the foregoing countries were as follows (give reason or reasons for stay in each country named):

(DO NOT USE THIS SPACE)

Application and passport submitted for Department's consideration
by _____ Agency, on _____ (Date)

Renewed by _____ Agency, on _____ (Date)
For ~~(one)~~ ^(two) years from ~~(today's date)~~ ^(date of expiration)

Until the _____ day of _____, 193
Edward Brando
(Agent, Department of State)

\$5.00 fee received by _____ (Signature)
(attached hereto deposited by agency.)

(Do not use this space)

FEB -4 1937

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The names listed below should be excluded from my passport as those members of my family will not accompany me on foreign travel now contemplated and for which I herein request renewal of my passport.

Wife _____ Minor child _____

Following are the names and dates of birth of my minor children who are over 18 years of age, who are included in my passport and who will accompany me on my contemplated travel abroad for which I herein request renewal of my passport:

(Name)

(Date of birth)

I am domiciled in the United States, and at present I am in the United States residing (together with those whose names appear in my passport) at _____

City of Yonkers State of New York

I intend to leave the United States from the port of _____
sailing on board the French Line on Feb, 1937

(Signature)

(I hereby declare that I personally affixed my signature appearing above)

Please mail passport to ^{above}_{following} address:

Street _____

City _____

State _____

(Do not use the following lines)

REMARKS:

Applicant maintains he will travel to France Switzerland and U.S.S.R. for business for self. occupation Journalist

This passport not
valid for travel in
SPAIN

Edward W. Anderson

Agent of the Department of State

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333

Government's Exhibit 7.

997

DAILY WORKER
50 EAST 13TH STREET
New York, N. Y.

Algonquin 4—7954

November 24, 1937

R. B. Shipley, Chief,
Passport Division,
Department of State,
Washington, D. C.

998

Dear Miss Shipley:

We request that the Department of State issue a passport to Mr. Earl Browder, good for travel in Spain, inasmuch as we are sending him there to replace our special correspondent, Seymour Waldman; who has just returned from there.

Mr. Browder is employed by the Daily Worker and has been a frequent contributor to our paper in the past, as well as to numerous other newspapers and magazines.

He will be in Spain for a period of approximately two months.

Sincerely yours,

999

(Signed) C. A. HATHAWAY
Editor.

CAH/VT

The Newspaper For Workers—Daily and Sunday Editions

(Government's Exhibit 7 has a notation thereon as follows:

Department of State
Washington

AMENDED Nov. 26, 1937 TO read:

1000

Government's Exhibits.

1. The bearer is a newspaper correspondent assigned to Spain and his ppt. is valid for travel in that country.

BY AUTHORITY OF THE SECRETARY OF STATE

R. B. SHIPLEY
Chief, Passport Division.
Department of State
Washington, D. C.

1001

Government's Exhibit 8.

THE NEW YORK AGENCY

9/1/34

* * * *
145182 Browder, Earl Russell
* * * *

1002

Government's Exhibit 9.

Original manifest of the Steamship Berengaria arriving
at New York, April 30, 1937, reflecting the arrival of Earl
Russell Browder.

Government's Exhibit 10.

Original manifest of the Steamship Aquitania arriving
at New York February 15, 1938, reflecting the arrival of
Earl Russell Browder.

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Nº 525715

IF BODIES OR DEUTELATED, RETURN TO FORGER OF VESSEL.

Port of NEW YORK

I, ~~the undersigned~~, declare that I am a resident of the country of U.S.A

that I resided in said country from May 20, 1891, 1891, to present, 19__.

that I reside at No. 7 Street Highland Place City Yonkers State N.Y.
(House) (Number) (Apt. No.) (Street) (Rural) (Highway) (Box) (Post Office) (City) (Village) (Town) (County) (State) (Country)

that I am a citizen of the country of USA; that I last sailed from the United

States on S. S. Beringia on March 3, 1937, from New York
 (Salmon) (Vapor) (Firework) (Bugs) (Datum) (Date) (Data) (Fecha) (Habit) (Port) (Porto) (Puerto)

that I am accompanied by the following-named members of my family and household who are included in this declaration: None

that I and those who accompany me are all residents of the same country and our baggage is enumerated below:

BAGGAGE	NUMBER OF TRUNKS (Kufas) (Kufas)	HAND PACKAGES, VALISES, BAGS, ETC. (Rukhshakhs) (Valises) (Vozlaga) (Malinas)	BALES, BOXES, BUNDLES (Kistun) (Kistun) (Korbo) (Korbo)	OTHER PACKAGES (Andere Pakete) (Aukre kolli) (Aukre pakchi) (Doma bultos)	TOTAL PIECES OF BAGGAGE (Zusammen) (Totale)	LETTER UNDER WHICH BAGGAGE WILL BE PLACED ON FIRE
					six	B

TO BE FILLED OUT BY PASSENGER		FOR CUSTOMS OFFICER'S NOTATIONS ONLY	
Description of articles (Designations) (Articles) (Articles) (Articles)		Value	Duty
4 Souvenir Rings	15.00		
Tape	5.00		
9 Paper & bonds wooden	5.00		
4 linen tablecloths	20.00		
Collection of Books (to 1919)	50.00		
Box of phonograph records	5.00		
TOTAL OF THIS SHEET		\$100.00	
TOTAL DUTY OR FINE			

EXHIBIT
U.S. Dist. Court
S.D. of N.Y.
JAN. 18 1940

EXHIBIT
U. S. Dist. Court
E. D. of N. Y.
JAN 18 1949

If more space is required, use continuation sheet, Customs Form 6043-Cont., which will be supplied by Power.

If more space is required, use continuation sheet, CUST-100.

Box of phonograph records

۵۰

EXHIBIT
U. S. Dist. Court
E. D. of N. Y.
JAN 18 1940

TREAD ON THIS SECRET

\$100⁰⁰

TOTAL OF THIS SHEET.....

Carried forward from continuation sheet

Carried forward from continuation sheet

TOTAL DECLARED

710.00

TOTAL DUTY OR FINE \$

DECLARATION OF RETURNING RESIDENT OF THE U. S.

I further declare that I have fully set forth herein all articles acquired abroad, timed or untimed, whether purchased or otherwise obtained, explained in my language or on any person or in the language of or on the persons named above accompanying me, that none of the said articles is for sale, and that not a centime has been given, or is to be paid in business, except as noted for sale; that I have not set forth herein previously published articles, but that I may, in future, publish or make the articles otherwise obtained, the said articles thereof to be for my own use and not for sale. That this declaration is made with the knowledge that failure to declare any article acquired abroad or any false statement in regard thereto will subject me to personal penalties and the articles involved to seizure. I further declare that I have not during the past 30 days received an exemption from duty such as is allowed a returning resident of the United States, except as

Encl. 1

Declared to before me 1-20, 1934, and
baggage examined and found correct unless otherwise noted.

Number of packages examined: _____ and number of stamps _____

Inspector

Passage stamp Nos.

DECLARATION OF NONRESIDENT OF THE U. S.

[illegible]

..... *Passenger*

VALUE AND DUTY AS NOTED ABOVE

Appraiser's Examiner.

Acting Deputy Collector.

3-381

GOVERNMENT EXHIBIT 12.

Customs Form 6033
TREASURY DEPARTMENT
Arts. 121, 417, 418, 882, C. R. 1931
March 1934

BAGGAGE DECLARATION AND ENTRY

BEFORE FILING OUT THIS DECLARATION READ CAREFULLY INSTRUCTIONS ON BACK OF THIS SHEET
IF SPOILED OR MUTILATED, RETURN TO PURSER OF VESSEL

No 638569

Name of Passenger E. J. BREIDER Vessel S.S. "AQUITANIA" Port of Arrival NEW YORK
(Name des Passagers) (Nom du passager) (Fahrer) (Vapour) (Arrival) (Hafen) (Port)
(Nomme di passaggere) (Nomme di passagere) (Fährer) (Vapour) (Arrival) (Hafen) (Port)

I, the undersigned, declare that I am a resident of the country of U.S.A.
(Land der Wohnstatt) (Pays de domicile) (Nazione di residenza) (País de residencia)

that I resided in said country from 1894 to present, 1937
(Ich wohnte, dort) (J'y ai demeuré) (Io dimorai là) (Residi allí) (Vough) (Dopo) (Da) (Desde) (Sin) (Desde) (Al) (Hasta)

that I reside at No. Street Highland Place City Yonkers State New York
(Númer) (Nómbr) (Indirizzo) (Dijmans) (Strasse) (Rue) (Calle) (Stadt) (Ville) (Ciudad) (Ciudad) (Stadt) (Pueblo) (Estado) (Estado)

that I am a citizen of the country of U.S.A.; that I last sailed from the United States on S. S. Queen Mary on December 15, 1937, from New York
(Staatsangehörigkeit) (Ciudadanía) (Cittadinanza) (Residencia) (Verweise des U. S. Konsuls) (Départ d'origine des E. U.) (Parti d'origine) (Salida de los E. U. A.)
(Fahrer) (Vapour) (Fährer) (Vapour) (Datum) (Date) (Fecha) (Hafen) (Port) (Hafen) (Port)

that I am accompanied by the following-named members of my family and household who are included in this declaration; none
(Names and relationship) (Sin relación) (Noms) (Je suis accompagné par) (Je suis accompagné par) (Vengo acompañado con) (Vengo acompañado con)

that I and those who accompany me are all residents of the same country and our baggage is enumerated below:

BAGGAGE:	NUMBER OF TRUNKS (Koffer) (Mallas) (Bastis) (Bastis)	HAND PACKAGES, VALISES, BAGS, ETC. (Reisegepäck) (Valises) (Valises) (Mallas)	BALES, BOXES, BUNDLES (Kisten) (Cajas) (Cajas) (Cajas)	OTHER PACKAGES (Andere Pakete) (Autres colis) (Altri pacchi) (Diversos paquetes)	TOTAL PIECES OF BAGGAGE (Zusammen) (Totale)	LETTER UNDER WHICH BAGGAGE WILL BE PLACED ON FEE
		<u>four</u>			<u>four</u>	<u>B.</u>

TO BE FILLED OUT BY PASSENGER (Gegenstände) (Articles) (Articoli) (Artículos)				FOR CUSTOMS OFFICER'S NOTATIONS ONLY (Für die Bemerkungen der Zollbeamten) (Pour les employés de la douane seulement) (Da riempire solamente dagli ufficiali di dogana) (Solo para las anotaciones de los empleados de aduana)		
Description of articles				Value	Rate	Duty
1 Set Chessmen				10 ⁰⁰		
2 Trian Photos				7 ⁰⁰		
3 Wooden boxes				3 ⁰⁰		
4 Bales Sandalwood				2 ⁰⁰		
5 Collection of Books (Copy value estimated)				20 ⁰⁰		
TOTAL OF THIS SHEET				44 ⁰⁰		
Carried forward from continuation sheet						
TOTAL DECLARED				44 ⁰⁰		
TOTAL DUTY OR FINE						

EXHIBIT
U. S. Dist. Court
S. D. of N. Y.
JAN 18 1940

If more space is required, use continuation sheet, Customs Form 6033—Cont., which will be supplied by Purser.

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337

1009

Government's Exhibit 13.

1010

Petition for Naturalization of Nicholas Dozenberg, dated November 1, 1910, and addressed to the United States District Court for the District of Massachusetts. [The signature of Nicholas Dozenberg appears in two places above the words "Complete and true signature of petitioner."]

1011

GOVERNMENT'S EXHIBIT 14.
(Mounted on Opposite Page.)

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GOVERNMENT EXHIBIT 14.

180621

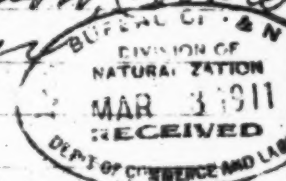
To be forwarded to the Bureau of
Immigration and Naturalization

Position, Volume 20 page 39 Sub. Volume 733 page 21

Description of holder: Age 28 years; height 5 feet 8 inches; color white; complexion light; color of eyes blue; color of hair brown; visible distinguishing marks none

Name, age and place of residence of wife Katherine 23 yrs. Boston, Mass.

Names, ages and places of residence of minor children No children



MASSACHUSETTS DISTRICT.

S.S.

 Nicholas Degenberg
(Signature of holder)

It is remembered, that at a term of the District court of the United States held at Boston on the 6th day of February, in the year of our Lord nineteen hundred and eleven, Nicholas Degenberg, who previously to his naturalization was a subject of Great Britain, of present residing at number 1309 Tremont Street, City of Boston (County of Suffolk, State of Massachusetts), having applied to be admitted a citizen of the United States of America pursuant to law, and the court having found that the petitioner had resided continuously within the United States for at least five years and in the State of Massachusetts for one year immediately preceding the date of the filing of his petition, and that said petitioner intends to reside permanently in the United States, had in all respects complied with the law in relation thereto, and that he was entitled to be so admitted, it was thereupon ordered by the said court that he be admitted as a citizen of the United States of America.

The testimony whereof the seal of said court is hereunto affixed on the 6th day of February in the year of our Lord nineteen hundred and eleven and of our Independence the one hundred and thirty-fifth.

 [Signature]
 (Official character of officer)

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Government's Exhibit 15.

List of passports sent by the Department of State, Washington, D. C., to the N. Y. Passport Agency, March 12, 1921. Included in this list is passport #2990 in the name of Nicholas Dozenberg.

GOVERNMENT'S EXHIBIT 16.

(Mounted on Opposite Page.)

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GOVERNMENT EXHIBIT 16.

The Department of State will act upon this application as promptly as possible after receipt. Inquiry concerning it should be made in case of emergency since the time consumed in responding to such an inquiry may retard the issue of a passport to you and would necessarily retard the issue of passports to other persons.

An application for a passport must have attached to it a copy of the applicant's photograph.

A loose signed photograph of the applicant must accompany the application.

The photographs must be on thin paper, should have a light background, and be not over three inches in size.

The legal fee for a passport is nine dollars, in currency, and one dollar for execution of application. The total fee is \$10.00. It is unnecessary to pay any other fee to any person in connection with filing out or execution of this application for obtaining the passport. The clerk of court or Passport Agent before whom this application is executed will give the applicant all necessary information and guidance.

[EDITION OF 1925]

[FORM FOR NATIVE CITIZEN]

UNITED STATES OF AMERICA

STATE OF NEW YORK

COUNTY OF NEW YORK

I, George Morris

(Name in full)

a NATIVE CITIZEN OF THE UNITED STATES, hereby apply

to the Department of State, at Washington, for a passport. I solemnly swear that I was born at Lawrence

(See footnote)

(City or town)

Kansas, on May 20, 1891

(State)

(Date)

(A woman must insert date of last marriage or state never been married)

that my father Wm Morris was born at Urbana Kansas

(A woman who has been married must refer to husband)

(City or town)

(State or country)

and is now residing at Danied 1912

(Give present address. If deceased, give date of death)

The portion in this block need not be filled in by a married woman or a person whose father was born in the United States.

My father emigrated to the United States on or about _____, resided continuously in the United States from 1 _____ to 1 _____, and was naturalized as a citizen of the United States before the _____ Court _____ (District, State, County) at _____ on _____ 1 _____

(City and State) (Month) (Day) (Year)

I have resided outside of the United States at the following places for the following periods:

(Name each country visited and length of stay in each)

None

from _____ to _____

(Departure from U.S.)

(Name of countries visited)

from _____ to _____

and that I am domiciled in the United States, my permanent residence being at 17 Christopher St. in the City of New York, State of New York

My last passport was obtained from _____ on _____

(Washington or location of office abroad)

(Date)

and was _____ I am about to go abroad temporarily and intend to return to the United States within _____ (months) _____ (years) with the purpose of residing and performing the duties of citizenship therein.

I desire a passport for use in visiting the countries hereinafter named for the following purpose:

Germany, France, EnglandTravel

(Name each country to be visited)

(Object of visit)

I request that my passport be issued to _____ who was born

(Name in full)

(Date)

at _____ and to whom I was married

(Place and state or country)

(Date)

on _____ [My wife was naturalized as a citizen of the United States before the (Portion in brackets not to be filled in if wife claims citizenship through birth in the United States)]

(Date of marriage)

Court of _____ at _____

(District, State, county)

(City and State)

as shown by the accompanying Certificate of Naturalization. I have naturalized _____

(Month) (Day) (Year)

she has resided abroad at the following places for the following periods:

4.0055

NOTE

30

MORRIS

GEOFFAGE

To be printed by applicant for passport

Passport No.

Seen and signed

Issued at Washington

NOV 20

I am about to go abroad temporarily and
 intend to return to the United States within 2 years with the purpose of residing and performing the duties of citizenship therein.
 I desire a passport for use in visiting the countries hereinafter named for the following purpose:
Germany, France, England Travel
 (Name each country to be visited) (Object of visits)
 I request that my passport be issued to [redacted] who was born
 at [redacted] on [redacted] and to whom I was married
 on [redacted] [My wife was naturalized as a citizen of the United States before the
 (Date of marriage) (Faction in brackets not to be filled in if wife claims citizenship through birth in the United States)
 Court of [redacted] at [redacted] (City and State)
 on [redacted] as shown by the accompanying Certificate of Naturalization. Once naturalized
 she has resided abroad at the following places for the following periods:
 from [redacted] to [redacted] (Departure from U. S.)
 from [redacted] to [redacted] (Return to U. S.)
 I am submitting the following evidence:
 EXHIBIT
 U.S. Dist. Court
 S. D. of N. Y. 1 (id) Born at [redacted]
 born at [redacted] on 43389
 born at [redacted] on [redacted]
 (Name) (Place and state or country) (Date)
 A person born in the United States should submit a birth or baptismal certificate with his application, or if the birth was not recorded, affidavits from the attend-
 ing physician, parents, or other persons having sufficient knowledge to be able to testify as to the date and place of the applicant's birth. The same kind of evidence
 should be submitted if American-born wife is included in the application and the marriage occurred on or after September 22, 1922. If wife acquired American citizen-
 ship through naturalization on or after September 22, 1922, evidence of her citizenship of the nature set forth in the Rules Governing the Granting and Issuing of Pass-
 ports in the United States should be submitted.

NOV 23 1927
 APR 26 1929
 FILED
 Seen and checked
 Issued at Washington

REC'D NOV 19 1927
 43389

OATH OF ALLEGIANCE

Further, I do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely, without any mental reservation or purpose of evasion: So help me God.

George Morris
(Signature of applicant)

NOV 17 1927

192

Charles Madison
Agent of the Department of State.

DESCRIPTION OF APPLICANT

Height: 5 feet, 5 inches. Age: 36 years.

Hair: chestnut Eyes: blue

Distinguishing marks or features Scar left chin
(Note any facial marks or scars by which you may be identified)

Place of birth Lawrence, Kansas Date of birth May 20, 1891
(City and State) (Month, day, and year)

Occupation journalist

I intend to leave the United States from the port of New York
(Port of departure)
sailing on board the Dec 15 on Dec 15, 1927
(Name of ship) (Date of departure)

ADDRESS

I request that my passport be mailed to the following address:

Name: George Morris

No. and Street: 40 William 17 Christopher St.

City and State: New York City, N.Y.

[NOTE.—A passport will not be mailed to a hotel address unless the hotel is the applicant's place of permanent residence. For safe and prompt return of passport, have it sent to Passport Agency, New York.]

I, the undersigned, solemnly swear that I am a citizen of the United States; that I reside at the address written below; signature hereto affixed; that I know the applicant who executed the affidavit herein before set forth to be a citizen of the United States; that the statements made in the applicant's affidavit are true to the best of my knowledge and belief; further, I solemnly

swear that I have known the applicant personally for five years.

No lawyer or other person will be accepted as witness to a passport application if he has received or expects to receive a fee for his services in connection with the execution of the application or obtaining the passport.

George Edward Powers
(Name of witness)
108 Goodrich St Astoria, O.
(Residence address of witness)

*Sworn to before me this NOV 17 1927 day

Charles Madison
Agent of the Department of State.



swear that the statements made in the application are true to the best of my knowledge and belief; further, I solemnly

swear that I have known the applicant personally for five years.

No lawyer or other person will be accepted as witness to a passport application if he has received or expects to receive a fee for his services in connection with the execution of the application or obtaining the passport.

George Edward Powers
(Name of witness)
108 Goodrich St Astoria, O.
(Residence address of witness)

Sworn to before me this 17 day

of April, 1927
Edward Madison
Agent of the Department of State.



*This certificate is not valid unless countersigned by an Agent of the Department of State or by a clerk of a Federal court or a State court having naturalization jurisdiction.



A signed duplicate of the photograph attached hereto must be sent to the Department with the application, to be affixed to the passport with an impression of the Department's seal.

16/2

GOVERNMENT EXHIBIT 16A.

AFFIDAVIT OF BIRTH TO BE SUBMITTED WITH APPLICATION
FOR AMERICAN PASSPORT

NOTE.—A very severe penalty is provided in Sections 3 and 4 of Title 9 of the Espionage Act approved June 3, 1917, for the falsification of applications for passports, or of affidavits or other documents to be used in connection therewith.

I, the undersigned, do solemnly swear that to the best of my knowledge and belief the following statements are true and correct:

That I have known

George Morris

(Name of person whose birth in the U. S. is to be proved.)

who

whom I know

is an applicant for an American passport; for the past *36* years:

That the person whose name appears above is now

deceased

residing at

17 Christopher St. New York

N. Y.

(Street address and city or town.)

(State.)

and was born in

Lawrence Kansas

Kansas

(City or town.)

(State.)

on or about

May 20

1891

(Month and date.)

(Year.)

and is my

son

(Name relationship or write "Not related.")

My knowledge and belief of place and date of birth appearing above are based upon the following facts:

(If affiant is not related to person whose birth in the U. S. is to be proved state briefly how and through what sources the knowledge was acquired.)

Personal knowledge

JAN 18 1940

JAN 1 19

Martha Morris

(Signature of affiant.)

Housewife

(Occupation and title of firm.)

1893 Daly Ave. Bronx

(Street address.)

New York City

(City and State.)

Subscribed and sworn to before me this

17th

day of

November

1937

J. L. Perilla

(Agent of the Department of State, Clerk of Court or Notary Public.)

[IMPORTANT—Use Impression seal.]

(OVER)

1-100

Government Form 16A

FD-16 16/A

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UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,*Plaintiff,*

against

EARL RUSSELL BROWDER,

Defendant. 1040

IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above action that the defendant Earl Russell Browder was born at Wichita in the State of Kansas in the United States of America on May 20, 1911, and that he is and has always been a native citizen of the United States of America.

Dated, New York, January 13, 1940.

EARL RUSSELL BROWDER,

Defendant in Person. 1041

BATTLE, LEVY, FOWLER & NEAMAN,
GEO. GORDON BATTLE,

Attorneys for Defendant.

JOHN T. CAHILL,

United States Attorney for the
Southern District of New York.

1042

Government's Exhibit 18.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA

against

EARL RUSSELL BROWDER,

Defendant.

1043

IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above named action that the handwriting, hereinafter referred to on a passport application in the name of Earl Russell Browder (a photostatic copy of which application is annexed hereto and marked Exhibit "A"*), on which passport #145182 was issued by the Department of State on September 1, 1934, and the handwriting hereinafter referred to on an application for the renewal of the said passport (a photostatic copy of which renewal application is hereto annexed and marked Exhibit "B"**) which renewal application was made on February 2, 1937, is conceded and admitted by the defendant, EARL RUSSELL BROWDER, to have been written by him.

1044

The handwriting hereinbefore referred to in the said passport application (Exhibit "A") is the following:

ON THE FIRST PAGE:

1. The written words "Earl Russell Browder" appearing between the printed word "I" and the printed words

*Exhibit "A" annexed to this stipulation is Government's Exhibit 2 appearing R. p. 305.

**Exhibit "B" annexed to this stipulation is Government's Exhibit 6 appearing R. p. 331.

Government's Exhibits.

1045

"a NATIVE CITIZEN OF THE UNITED STATES",
and above the printed words "(Name in full)".

2. The written words "Wichita Kansas" appearing between the printed words "I was born at" and the printed word "on" and above the printed words "(City or Town)" and "(State)".

3. The written words and numerals "May 20, 1891" appearing between the printed word "on" and the printed words "that I was" and above the printed word "(Date)".

4. The written words "Wm Browder" appearing between the printed words "that my father" and the printed words "was born at" and above the printed words "(A woman who has been married must insert husband's name)". 1046

5. The written word "Kentucky" appearing between the printed words "was born at" and the printed words "and is now residing" and above the printed words "(City or town) (State or country)".

6. The written words and numerals "1601 No. Morrell, Englewood, Mo." appearing after the printed words "is now residing at" and above the printed words "(Give present address. If deceased, give date of death)". 1047

7. The written words and numerals "2714 Wallace Ave." appearing between the printed words "residence being at" and the printed words "in the city of" and above the printed words "(Street address)".

8. The written words "New York" appearing between the printed words "city of" and the printed words "State of".

9. The written words "New York" appearing between the printed words "State of" and the printed words "I have not taken".

1048

Government's Exhibits.

10. The written word "None" appearing between the printed words "obtained from" and the printed word "on" and above the printed words "(Insert Washington or location of office abroad)".

11. The written word "Six" appearing between the printed words "United States within" and the printed word "months".

ON THE SECOND PAGE:

1049

12. The written words "Earl Russell Browder" appearing after the printed oath of allegiance and above the printed words "(Signature of applicant)".

13. All written matter appearing under the printed heading "DESCRIPTION OF APPLICANT", and between the printed heading "DESCRIPTION OF APPLICANT" and the printed heading and words "ADDRESS". I request that my passport be mailed to the following address:"

The handwriting hereinbefore referred to in the said application for a renewal (Exhibit "B") is the following:

1050

1. The written words "Earl Russell Browder" appearing on the second page after the printed word "(Signature)" and above the printed words "(I hereby declare that I personally affixed my signature appearing above)".

Dated, New York, N. Y., January 6th, 1940.

EARL RUSSELL BROWDER,

Defendant, in Person

BATTLE, LEVY, FOWLER & NEAMAN,
GEO. GORDON BATTLE,

Attorneys for Defendant

JOHN T. CAHILL,

United States Attorney for the
Southern District of New York

Government's Exhibit 19.

1051

Mailing list of the Department of State, Washington, D. C., headed "Passport Division 11/21/27" indicating the mailing on that date by registered mail of passport #702412 to George Morris, c/o Williams, 17 Christopher Street, N. Y. C.

Government's Exhibit 20.**NEW YORK AGENCY 11/19/31**

1052

451933 Richards, Albert Henry

Government's Exhibit 21.

Passport Regulations—Rules Governing the Granting and Issuing of Passports in the United States, revised to March 31, 1938.

1053

Government's Exhibit 22.

Passport Regulations, Executive Order January 31, 1938—Rules Governing the Granting and Issuing of Passports in the United States—regulations concerning passports and applications therefor issued by the Secretary of State in pursuance of Executive Order of January 31, 1928.

1054

Government's Exhibit 23.

THE DEPARTMENT OF STATE

PASSPORT SERIES, No. 3

PASSPORT REGULATIONS

RULES GOVERNING THE GRANTING
AND ISSUING OF PASSPORTS
IN THE UNITED STATES

1055

EXECUTIVE ORDER NO. 5860 OF JUNE 22, 1932

DEPARTMENTAL ORDER NO. 538 OF JUNE 22, 1932

(Emblem)

United States
Government Printing Office
Washington: 1932

PUBLICATION No. 366

EXECUTIVE ORDER NO. 5860

1056

RULES GOVERNING THE GRANTING AND
ISSUING OF PASSPORTS IN THE UNITED
STATES

Section 1 of the act of July 3, 1926 (U. S. Code, title 22, sec. 211a), provides that "The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States, and by such consul generals, consuls, or vice consuls when in charge, as the Secretary of State may designate, and by the chief or other executive officer of the insular possessions of the

United States, under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports." The following rules are accordingly prescribed for the granting and issuing of passports in the United States.

SECTION I.—AUTHORITY TO ISSUE PASSPORTS IN THE
UNITED STATES AND ABROAD

1. Section 1 of the act of July 3, 1926 (U. S. Code, title 22, sec. 211a), and section 4078 of the Revised Statutes as amended by the act of June 14, 1902 (U. S. Code, title 22, sec. 219), provide that no one but the Secretary of State may grant and issue passports in the United States, and he is empowered to refuse them in his discretion.

1058

2. Passports are issued by American consular officers abroad. A citizen who is abroad and desires to procure a passport should apply therefor to the nearest American consular officer.

3. Passports are issued in the Virgin Islands, Hawaii, the Philippines, Guam, American Samoa, and Puerto Rico by the chief executives of those islands. Applications for passports by persons residing therein should be made to such chief executives.

1059

SECTION II.—TO WHOM PASSPORTS ARE ISSUED

4. Section 4076 of the Revised Statutes of the United States as amended by the act of June 14, 1902 (U. S. Code, title 22, sec. 212), provides that "No passport shall be granted or issued to or verified for any other persons than those owing allegiance, whether citizens or not, to the United States."

1060

Government's Exhibits.

5. Unless a request is made by the parental or other guardian that a passport be denied, passports may be issued to minors upon their own application.

6. Children may execute applications on their own behalf when of sufficient intelligence to understand the statements therein and the nature of the oath of allegiance.

7. As a rule children of 12 years of age or more should be required to execute their own applications.

1061

8. If circumstances warrant, a parent or guardian may execute applications on behalf of minors of any age. The application should be signed thus: "Richard Roe, by John Roe, father." The oath of allegiance need not be administered.

SECTION III.—PERSONS WHO MAY BE INCLUDED
IN ONE PASSPORT

1062

9. Only persons who are citizens or who owe allegiance to the United States may be included in a passport of the United States.

10. A passport issued to a husband or father may include his wife and unmarried minor children. A woman's passport may include her unmarried minor children.

11. A minor brother or sister may be included in the passport of an elder brother or sister.

12. A minor grandchild, niece, or nephew of tender years may be included in the passport of the relative when the application therefor is accompanied by a request from the parental or other guardian.

Government's Exhibits.

1063

13. Members of the immediate family who are 21 years of age, maidservants, and manservants must bear separate passports.

14. Adopted children, who are American citizens, may be included in a passport issued to the adoptive parents. (See rule 74.)

SECTION IV.—FEE FOR THE EXECUTION OF AN APPLICATION AND FOR A PASSPORT; PASSPORTS ISSUED WITHOUT FEES

15. Section 1 of the act of June 4, 1920 (U. S. Code, title 22, sec. 214), provides in part as follows:

1064

"From and after the 1st of July, 1920, there shall be collected and paid into the Treasury of the United States quarterly a fee of \$1 for executing each application for a passport: . . . *Provided*, That nothing herein contained shall be construed to limit the right of the Secretary of State by regulation to authorize the retention by State officials of the fee of \$.1 for executing an application for a passport: *And provided further*, That no fee shall be collected for passports issued to officers or employees of the United States proceeding abroad in the discharge of their official duties, or to members of their immediate families, or to seamen, or to widows, children, parents, brothers, and sisters of American soldiers, sailors, or marines buried abroad whose journey is undertaken for the purpose and with the intent of visiting the graves of such soldiers, sailors, or marines, which facts shall be made a part of the application for the passport."

1065

16. Section 2 of the act of May 16, 1932, provides:

"That the validity of a passport . . . shall be limited to a period of two years: *Provided*, That a passport

1066

Government's Exhibits.

may be renewed under regulations prescribed by the Secretary of State for a period, not to exceed two years, upon payment of a fee of \$5 for such renewal but the final date of expiration shall not be more than four years from the original date of issue: *Provided further*, That the Secretary of State may limit the validity of a passport, . . . or the period of renewal of a passport to less than two years: *Provided further* That the charge for the issue of an original passport shall be \$9."

1067

17. Under the provisions of the act of June 4, 1920, a fee of \$1 must be collected for the execution of each application for a passport. There is no exception to this rule.

SECTION V.—APPLICATIONS FOR PASSPORTS.

1068

21. The act of June 15, 1917 (U. S. Code, title 22, sec. 213), requires every applicant for a passport issued under the authority of the United States to submit a written application, duly verified by his oath, and containing a true recital of each and every matter of fact which may be required by law or by rules authorized by law as a prerequisite to the issuance of a passport.

22. The application must be made in person and signed by the person to whom the passport is to be issued. [See rule 38.]

23. The application must be executed before a clerk of a Federal court or a State court authorized by the act of Congress of June 29, 1906 (34 Stat. 596), to naturalize aliens, or before an agent of the Department of State.

24. The seal of the court, when the application is executed before a clerk of court, or the seal of an agency of the Department of State when the application is executed before such agent, must be affixed to the application.

25. Where the application is not made at or near the place where the applicant resides, the applicant should give the name and address of a reputable person, residing at or near the place of the applicant's residence, to whom the clerk of court, the agent of the Department of State, or the Department of State itself may address such inquiry as may be necessary concerning the applicant. Where it is necessary to make inquiries by telegraph, the applicant should bear the expense thereof.

1070

SECTION VI.—CONTENTS OF APPLICATION FOR A PASSPORT

a. *General.* Each application for a passport must contain the following:

26. The applicant's name.

27. The names, places, and dates of birth of other persons to be included in the passport. (See Section III.)

1071

28. Date of the marriage, if the wife is to be included in the husband's passport or is applying for a passport in her own name.

29. The place and date of the applicant's birth.

30. The name of the applicant's father, the country of his birth, and his present place of residence. If the applicant is a married woman or has ever been married, in lieu of information concerning the country of birth and present place of residence of her father, information con-

1072

Government's Exhibits.

cerning the country of birth and present place of residence of her husband or former husband, if the marriage has been terminated, must be stated in the application, unless the citizenship of the woman is dependent upon the father, in which case information concerning both the father and husband or former husband must be stated in the application. [See sec. XI.]

1073

31. When and for what period of time the applicant has resided outside of the United States, provided he is naturalized citizen.

32. The applicant's place of permanent residence, if any, in the United States and the occupation followed by him at that place.

33. The number, date, place of issue, and the disposition made of any previous passport issued to the applicant. [See rule 14.]

34. The period within which the applicant intends to return to the United States for permanent residence.

1074

35. The applicant's intended port and date of departure, and the name of the vessel if known at the time of making application for passport.

36. The applicant's oath or affirmation of allegiance to the United States.

37. Whether the applicant since acquiring American citizenship has taken an oath of allegiance to, or been naturalized in, a foreign state.

38. The applicant's name should appear in full on the front page of the application, thus, "John Henry Smith,"

Government's Exhibits.

1075

not "J. H. Smith"; a married woman's name should appear on the front of her application in the family name of her husband, thus, "Mary Elizabeth Doe," not "Mrs. John Doe." If the applicant is a married woman who desires the use of her maiden or professional name, she may, in applying for a passport, use her maiden or professional name followed by the name of her husband—thus, "Mary Doe (wife of John Henry Jones)"—provided she submits satisfactory proof that she customarily uses her maiden or professional name and is regularly known thereunder in the community where she lives. The application should be signed by the applicant in his or her usual signature. If the applicant signs by mark, two attesting witnesses to the signature are required.

1076

39. Description of the applicant. Whenever possible some distinguishing mark or feature should be noted in the space provided therefor.

f. Object of the applicant's journey abroad.

40. The applicant for a passport must state in his application the names of the countries he expects to visit and the object of the visit to each.

1077

41. The Secretary of State may within his discretion require an applicant for a passport, or for the amendment or extension of a passport, to submit satisfactory evidence of the object of his journey abroad.

c. Photographs of the applicant and persons accompanying the applicant.

42. The application must contain a recently taken photograph of all persons who are included in the application. A group photograph is preferable.

1078

Government's Exhibits.

43. Photographs should have a light background and must be on *thin* paper not more than 3 by 3 inches and not less than 2½ by 2½ inches in size.

44. The photograph of the person or persons included in the application must be attached to the back of the application under the seal of the officer before whom the application is executed.

1079

45. A duplicate copy of the photograph attached to the application must accompany the application for use in the passport for which application is made.

46. Passport photographs must be signed by the applicant, the signature to correspond with the signature in the application.

47. Photographs in uniform will not be accepted except from applicants who are in the active service of the military forces of the United States.

d. Affidavit of a supporting witness.

1080

48. The applicant must be accompanied by at least one credible witness, an American citizen, who has known the applicant for a period of two or more years.

49. The application should contain the supporting affidavit of such a witness, who must state the period of time during which he has known the applicant; that the applicant is the person whom he represents himself to be, and that his statements are true to the best of his knowledge and belief.

50. Such supporting affidavit, together with any additional affidavit or affidavits which may be required, shall

Government's Exhibits.

1081

become part of the application, so that the following provisions of law shall be applicable: United States Code, title 22, sec. 220, concerning the making of false statements in applications and the penalty prescribed thereunder; United States Code, title 18, sec. 231, concerning perjury and the penalty prescribed thereunder; and United States Code, title 18, sec. 88, concerning conspiracies to commit an offense against or to defraud the United States and the penalty prescribed thereunder.

51. The applicant or the witness should reside within the jurisdiction of the officer before whom the application is executed. 1082

52. If the applicant or the witness is not known to the clerk of court or passport agent and can not present conclusive documentary evidence of identity, the applicant must be accompanied by an American citizen established in a recognized profession or business and having his office or place of business within the jurisdiction of the court or the passport agency (e. g., a clergyman, lawyer, physician, banker, broker, real estate dealer, or merchant). Clerks of courts and passport agents should satisfy themselves of the identity and *bona fides* of the applicants and their witnesses. 1083

53. No lawyer or other person who expects to receive a fee in connection with the application or passport will be accepted as a witness.

54. A passport issued by the Secretary of State to which is affixed the photograph and signature of the person to whom the passport was originally issued will be accepted in lieu of an identifying witness.

1084

*Government's Exhibits.***SECTION VII.—APPLICATIONS OF OFFICERS OR EMPLOYEES OF THE UNITED STATES AND OF THEIR IMMEDIATE FAMILIES**

61. Officers or employees of the United States proceeding abroad under orders must submit with their applications a written request from the head of the department or office in which the applicant is employed for the issue of a passport to the applicant. The request should set forth the nature of the employment of the applicant and the official nature of his journey abroad.

1085

62. Applicants for passports who are the members of the immediate family of an officer or employee of the United States who is about to proceed abroad or who is abroad in the discharge of official duties are not required to submit documentary evidence of their status if they refer to a passport issued to such an officer or employee of the United States.

SECTION VIII.—APPLICATIONS OF AMERICAN SEAMEN

1086

63. As a rule American seamen traveling as such should use in lieu of passports the seaman's certificate of citizenship issued by customs officials. Nevertheless, passports are issued to seamen who are citizens or who owe allegiance to the United States whenever passports are required upon the travel in which the seamen are engaged.

64. A seaman should transmit with his application the seaman's certificate of American citizenship or other official document of nationality or identity of which he is the bearer together with such additional evidence of American citizenship called for by Section X.

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Government's Exhibits.

1087

**SECTION X.—EVIDENCE OF CITIZENSHIP TO ACCOMPANY
APPLICATIONS FOR PASSPORTS***a. Native citizen.*

66. A person born in the United States in a place where official records of birth were kept at the time of his birth must submit with the application a birth certificate under the seal of the official custodian of birth records. A certificate to be acceptable must show the place and date of birth and that the record thereof was made at the time of birth or shortly thereafter. If a birth certificate is not obtainable, that fact should be shown, and the application should be supported by a baptismal certificate or a certified copy of the record of baptism under the seal of the church in which the applicant was baptized, giving the place and date of birth, the date of baptism; and the date on which the record of baptism was made. A baptismal certificate to be acceptable must show that the baptism occurred within a short time after the birth of the applicant. If birth and baptismal certificates are not obtainable, an affidavit of the parent or of the physician, nurse, or midwife who attended the birth or the affidavit of a reputable person having sufficient knowledge to be able to testify as to the place and date of the applicant's birth may be accepted. A person who did not attend the birth but who testifies concerning the place and date of the applicant's birth should state briefly how and through what source the knowledge was acquired.

1088

1089

68. If the applicant comes within the provisions of rules 66 or 67, reference to an application submitted since November 1, 1916, will be sufficient, provided there is a record on the previous application of the necessary evidence of citizenship having been submitted.

1090

*Government's Exhibits.**b. Persons claiming citizenship through naturalization of self or parent.*

69. A person claiming citizenship through naturalization, against whom the presumption of having ceased to be an American citizen has arisen under the provisions of section 2 of the act of March 2, 1907 (34 Stat. 1228), must submit with his application a supplementary affidavit setting forth the exact places and periods of foreign residence and the reasons therefor.

1091

70. A person naturalized in his own right must transmit with his application his certificate of naturalization.

71. The child of a naturalized citizen claiming citizenship through the naturalization of the parent must state in the application the exact date of immigration to the United States and submit the parent's certificate of naturalization.

72. A child born abroad after the naturalization of the parent must submit with his application evidence of the nature described in the preceding rule.

1092

73. If the applicant comes within the provisions of rules 70, 71, or 72, his old passport will be accepted in lieu of a certificate of naturalization, provided the application upon which a previous passport was issued is found to contain sufficient information as to the naturalization of the applicant or the parent.

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d. Wife included in husband's application.

75. When a wife is to be included in the husband's passport, in addition to evidence of his own citizenship

Government's Exhibits.

1093

his application must be accompanied by evidence of his wife's citizenship if they were married on or after September 22, 1922.

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SECTION XIII.—THE USE OF TITLES AND BUSINESS OR PROFESSIONAL NAMES IN PASSPORTS

87. Professional and other titles will not be inserted in passports, but an applicant's name in religion, an author's *nom de plume*, a stage or business name, etc., may be included in parentheses after the bearer's name. 1094

88. Persons who have had their names changed by decree or order of a court may be issued passports in the changed name upon submission of a certified copy of the decree or order of the court.

89. If the name is changed by the applicant himself having adopted a new name, affidavits must be submitted from two or more persons to the effect that the applicant uses the new name, has used it for a stated period of time, is known by such name in the community in which he resides, and carries on his business or profession in that name. 1095

SECTION XIV.—PERIOD OF VALIDITY OF PASSPORTS AND EXTENSION OF LIMITED PASSPORTS

90. Section 2 of the act of May 16, 1932, provides in part as follows:

“That the validity of a passport . . . shall be limited to a period of two years: *Provided*, That a passport may be renewed under regulations prescribed by the Secretary of State for a period, not to exceed two years, upon payment of a fee of \$5 for such renewal,

1096

Government's Exhibits.

but the final date of expiration shall not be more than four years from the original date of issue: *Provided further*, That the Secretary of State may limit the validity of a passport, . . . or the period of renewal of a passport to less than two years: *Provided further*, That the charge for the issue of an original passport shall be \$9."

1097

91. The original period of possible validity of a passport issued under the act of May 16, 1932, is restricted to two years, but the passport may be renewed for a period of not more than two years upon payment of a fee of \$5.

92. The Department of State is authorized in its discretion to restrict the original or renewal period of a passport to less than two years.

1098

93. A passport which was issued within the period of four years prior to application for renewal may be renewed in the discretion of the Department of State; but in any case where a person fails to apply for renewal of his passport prior to or immediately after the expiration of the original period of validity of two years his passport, when renewed, shall not extend beyond a period of four years from the original date of issue.

94. The fee for the renewal of a passport is \$5.

95. Requests for renewal of a passport should not be made until the passport has expired or is about to expire.

96. As a rule, passports having a remaining validity of more than three or four months should not be renewed unless special circumstances should warrant exceptional procedure.

Government's Exhibits.

1099

97. Requests for renewal may be made by personal application or letter addressed to the Department of State, a passport agent, a consular officer of the United States, or the chief executive of Hawaii, the Philippines, Puerto Rico, the Virgin Islands, Guam, or American Samoa.

98. The fee of \$5, in currency or postal money order, should accompany each request for renewal. Postal money orders should be made payable to the Disbursing Officer, Department of State.

99. Drafts or checks will not be accepted.

1100

100. Each request for renewal should be accompanied by the passport which it is desired to be renewed.

101. A person who holds an expired passport and desires a new passport must submit a new application therefor.

102. A person in the United States who has been issued a passport restricted in validity to a period less than two years and who desires to apply for an extension of the validity of the passport to the full period of two years should communicate with the Department of State, unless he resides in a place where there is an agent of the Department of State, in which case the application for extension may be forwarded through such agent.

1101

103. A person outside the United States holding a passport which has been restricted in validity may apply through a diplomatic or consular officer of the United States or through the chief executive of one of the insular possessions of the United States to have his passport extended.

104. No fee is required for the extension of a passport.

1102

Government's Exhibits.

SECTION XV.—AMENDMENT OF PASSPORTS

105. Passports may be amended in the United States by the Department of State or any of the passport agents of the Department of State.

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109. A passport may be amended upon the written request of the bearer to indicate the object of a particular journey.

1103

110. Passports may be amended to include those persons only who are citizens of or who owe allegiance to the United States.

111. An application for the amendment of a passport to include any person or persons should be in writing and accompanied by two satisfactory photographs (see rule 43) and evidence of citizenship, as required by these rules.

112. A passport may be amended to include the husband, wife, or minor children.

1104

113. A passport of a brother or sister may be amended to include younger brothers and sisters.

114. A passport may be amended, with the written consent of parent or guardian, to include a grandchild, niece, or nephew of tender years.

115. A passport will not be amended to include a person who bears a valid passport or who is included in a valid passport unless such passport is submitted for cancellation or for amendment to exclude the applicant for a new or separate passport.

Government's Exhibits.

1105

116. A passport may be amended upon the written request of the bearer to exclude a person or persons originally included in the passport.

SECTION XVI.—ADDITIONAL REGULATIONS

117. The Secretary of State is authorized to make regulations on the subject of granting and issuing of passports additional to these rules and not inconsistent with them.

HERBERT HOOVER

1106

THE WHITE HOUSE,

June 22, 1932.

DEPARTMENTAL ORDER NO. 538

ORDER BY THE SECRETARY OF STATE REGARDING PASSPORTS AND APPLICATIONS FOR PASSPORTS

SECTION I.—PREVIOUS RULES AND REGULATIONS

1107

1. All previous departmental rules and regulations relating to the subject of this order are hereby revoked.

SECTION II.—PASSPORT AGENTS OF THE DEPARTMENT OF STATE

2. Agents of the Department of State authorized to take applications for passports and to perform passport services are stationed at New York, Boston, Chicago, New Orleans, San Francisco, Seattle,¹³ and in the Department of State at Washington.

¹³Discontinued Aug. 15, 1932.

1108

Government's Exhibits.

SECTION III.—BLANK FORMS OF APPLICATIONS FOR PASSPORTS

3. Blank forms of applications for use in applying for passports will be furnished, on request, without charge, by the Department of State to persons who wish to apply for passports.

1109

4. Clerks of courts authorized to take passport applications, passport agents of the Department of State, and American consular officers should be supplied with the necessary blank forms of application for passports.

SECTION IV.—TRANSMISSION OF APPLICATIONS AND PASSPORTS

5. Applications when properly executed must be sent by registered mail directly to the Passport Division, Department of State, Washington, D.C., by the clerks of courts or passport agents before whom they are executed.

1110

6. An applicant who so requests may have his application transmitted to this department *at his own risk* by special delivery or air mail. For this purpose he must furnish the clerk of the court or agent taking the application with a special-delivery stamp or sufficient air-mail stamps.

7. If there are good reasons for immediate action upon any application, a brief statement to that effect by the officer before whom the application is executed may be attached to the *face* of the application.

8. As a rule a passport will be forwarded to the applicant by registered mail, directed to the address given in the application, except that a passport will not be forwarded to a hotel unless the hotel is the applicant's place of permanent residence.

9. On the request of the applicant, a passport, if issued, or a passport which has been submitted for amendment or extension, will be forwarded by special-delivery or air mail at the applicant's risk, provided there is attached to the application sufficient special-delivery or air-mail stamps. If the applicant desires the passport forwarded by air mail a registry stamp should also be forwarded. If stamps are not enclosed when it is desired that the passport be forwarded by air mail or special delivery, a separate money order should be enclosed covering postage. The cost of postage should not be included in money order covering the passport or renewal fee. 1112

SECTION V.—SURRENDER OF OLD PASSPORTS

10. An applicant for a new passport who holds an expired or an unexpired passport issued on or after January 3, 1918, should submit the old passport to the official before whom he executes his application for a new passport.

11. Old passports, submitted to clerks of courts by native citizens, may be canceled by cutting out with scissors a part of both covers and of all the pages of the passport. 1113

12. A notation of the cancellation, giving the date, number, and place of issue of the canceled passport, should be made on the margin of the new application.

13. An old passport held by a person who claims citizenship through naturalization should be attached to the application for a new passport and forwarded to the department for cancellation.

14. If the applicant for a new passport is unable to present for cancellation or surrender a previous passport, issued since January 2, 1918, which has expired, he should

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Government's Exhibits.

state in his application the disposition of the passport. If the previous passport is still valid, the applicant should submit a *separate statement, under oath, setting forth in circumstantial detail the disposition of the passport.*

SECTION VI.—CLERKS OF COURTS AUTHORIZED TO RETAIN
\$1 FEE FOR THE EXECUTION OF PASSPORT APPLICATIONS

15. Section 1 of the act of June 4, 1920, reads in part as follows:

1115

... *Provided*, That nothing herein contained shall be construed to limit the right of the Secretary of State by regulation to authorize the retention by State officials of the fee of \$1 for executing an application for a passport. . . .

1116

16. Clerks of courts other than Federal courts, who are authorized to take applications for passport, . . . are hereby authorized to retain a fee of \$1 for executing each application for a passport. They may not charge or retain more than that amount for executing an application for a passport. This regulation does not in any manner restrict the right of any State to make laws or regulations concerning the disposition of fees retained by clerks of State courts for executing applications for passports.

SECTION VII.—RETURN OF PASSPORT FEES

17. Section 4 of the act of June 4, 1920, reads as follows:

Whenever the appropriate officer within the United States of any foreign country refuses to visa a passport issued by the United States, the Department of State is hereby authorized upon request in writing and the return of the unused passport within six

Government's Exhibits.

1117

months from the date of issue to refund to the person to whom the passport was issued the fees which have been paid to Federal officials, and the money for that purpose is hereby appropriated and directed to be paid upon the order of the Secretary of State. [U. S. C., title 22, sec. 216.]

18. A person who desires to have the fee which he paid to the Department of State for a passport returned to him because of his inability to secure the necessary visa must return his passport to the Department of State within six months from the date of issue of the passport and submit therewith a signed request for refund. The request must contain a circumstantial statement that he has applied for a visa and that the visa has been refused, and should state the reasons, if any, assigned for the refusal of the visa. If such person has received a statement in writing from a foreign official refusing to visa his passport, the statement should be submitted to this department as evidence of the refusal of the visa.

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SECTION VIII.—INQUIRIES CONCERNING APPLICATIONS
SUBMITTED

1119

19. All inquiries concerning passport applications which have been submitted to the Department of State should be made directly to the department by the applicant. The Department of State will act upon applications as promptly as possible after their receipt. Inquiry concerning applications should be made only in cases of emergency, since the time consumed in responding to such inquiries necessarily retards the examination of applications.

20. Applications should be submitted sufficiently far in advance of the date upon which the passport is required to permit the department to communicate, when necessary,

1120

Government's Exhibits.

with the applicant or other persons concerning the citizenship of the applicant or with respect to any defects which may appear in the application.

21. Communications should be addressed to the Department of State, Passport Division, Washington, D. C. Each communication should give the post-office address of the person to whom the answer is to be directed.

HENRY L. STIMSON

1121

DEPARTMENT OF STATE,

*June 22, 1932.***Government's Exhibit 24.**

Executive Order 6650 of March 23, 1934—Amendment of Executive Order 5860 of June 22, 1932 [prescribing rules governing the granting and issuing of passports in the United States], with reference to passport fees and renewal fees and cancelling rule 99.

1122

Government's Exhibit 25.

Identical with Government's Exhibit 23, appearing herein at pp. 352-374.

Government's Exhibit 26.

Photographic enlargement of front page of Government's Exhibit 2.

Government's Exhibit 27.

1123

Photographic enlargement of reverse side of Government's Exhibit 2.

Government's Exhibit 28.

Photographic enlargement of first page of Government's Exhibit 14.

1124

Government's Exhibit 29.

Photographic enlargement of reverse side of Government's Exhibit 14.

Government's Exhibit 30.

Photographic enlargement of first page of Government's Exhibit 11.

1125

Government's Exhibit 31.

Photographic enlargement of first page of Government's Exhibit 12.

Government's Exhibit 32.

Photographic enlargement of the word "None" on Government's Exhibits 3, 3a, 4 and 16.

1126

Government's Exhibit 33.

Photographic enlargement of reverse side of Government's Exhibit 3.

Government's Exhibit 34.

Photographic enlargement of first page of Government's Exhibit 3.

1127

Government's Exhibit 35.

Photographic enlargement of first page of Government's Exhibit 16.

Government's Exhibit 36.

Photographic enlargement of first page of Government's Exhibit 4.

Government's Exhibit 37.

1128

Photographic enlargement of reverse side of Government's Exhibit 4.

Government's Exhibit 38.

Photographic enlargement of reverse side of Government's Exhibit 3a.

Government's Exhibit 39.

Photographic enlargement of reverse side of Government's Exhibit 16.

Government's Exhibit 40.

1129

Photographic enlargement of first page of Government's Exhibit 3a.

Government's Exhibit 41.

Photographic enlargement of 2 signatures of Nicholas Dozenberg appearing on Government's Exhibit 13.

Stipulation as to Exhibits.

1130

IT IS HEREBY STIPULATED AND AGREED, by and between the attorneys for the respective parties that the attorneys for either side may use upon the argument, refer to, or hand up to the Judges of the Circuit Court of Appeals for the Second Circuit for their inspection; any original exhibit introduced in evidence upon the trial of this case; and

IT IS FURTHER STIPULATED AND AGREED, that not less than three days prior to the argument the attorney so proposing to use, refer to, or hand up such original exhibit, shall give notice in writing of such intention to the opposing attorney. 1131

Dated, New York, February 29, 1940.

JOHN T. CAHILL,
United States Attorney,
Attorney for Plaintiff-Appellee.

EDWARD KUNTZ,
Attorney for Defendant-Appellant.

1132

Judgment.

At a Stated Term of the District Court of the United States of America, for the Southern District of New York, held at the United States Court House, in the Borough of Manhattan, City of New York, on January 22, 1940.

Present—The Honorable ALFRED C. COXE, Judge.

THE UNITED STATES OF AMERICA

vs.

EARL RUSSELL BROWDER, alias
"Nicholas Dozenberg", alias
"George Morris", alias "Al-
bert Henry Richards".

C. 106/210..

U. S. Criminal Code,
Section 220,
Title 22, U. S. C.

Unlawful use of
passport obtained by
false statement.

1133

On motion of the United States Attorney, ordered sentence.

It is thereupon ordered and adjudged that the above named defendant be committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment in a penitentiary.

1134

For and during the term and period of

Count 1—Two years and fined \$1,000.

Count 2—Two years and fined \$1,000.

Prison sentence on counts 1 and 2 to run consecutively. Prison sentence on count 2 to begin after sentence on count 1.

Bail continued in the sum of \$7,500 pending appeal and to stand committed until such fine and costs shall be paid or until he shall be otherwise discharged by due course of law.

ALFRED C. COXE,
United States District Judge.

Notice of Appeal.

1135

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

 UNITED STATES OF AMERICA

against

EARL RUSSELL BROWDER,

Defendant. 1136

 Name and address of Appellant: Earl Russell Browder,
7 Highland Place, City of Yonkers, State of New York.
Name and address of Appellant's attorney: Edward
Kuntz, Esq., 100 Fifth Avenue, New York City.Offense: Violation of Section 220 of Title 22, United
States Code.

Date of Judgment: January 22, 1940.

Brief Description of Judgment or Sentence: Two years
and One Thousand Dollars on each count to run consecu-
tively.

1137

Name of prison where now confined, if not on bail: De-
fendant admitted to bail in sum of \$7,500 pending appeal.I, the above named appellant, hereby appeal to the
United States Circuit Court of Appeals for the Second
Circuit from the judgment above-mentioned on the grounds
set forth below:Pursuant to Rule V, I hereby serve notice that I do not
elect to enter upon the service of sentence pending appeal.

Dated, New York, January 23, 1940.

EARL RUSSELL BROWDER,
Appellant.

1138

Grounds of Appeal:

1. That the Court erred in denying the application to strike from the indictment references to crimes alleged to have occurred in 1921 and 1927, to the prejudice of the defendant.

1139

2. That the Court erred in refusing to dismiss the indictment upon the application of the defendant on the opening of the trial on the grounds that the indictment was insufficient in law and failed to set forth a crime; that upon its face it appeared that there was no use of a passport under the statute on which the indictment was based; that there was no false statement in the application made by the defendant upon which the indictment was based; that the alleged statement was not material and that the passport issued to him was not issued by reason of the said alleged statement; that the passport was not issued to the defendant by reason of the application containing the said alleged false statement but upon another renewal application which contained no false statement; that the offense alleged in the indictment was outlawed by the statute of limitations; and for all the other reasons cited in the motion to dismiss at the opening of the trial.

1140

3. That the defendant was deprived of his constitutional guarantees under the Fifth Amendment of the Constitution in that the indictment failed to allege the offense clearly and precisely so as to apprise the defendant as to the nature of the charge against him.

4. That the construction of the statute herein by the Court whereby it was held that the presentation of a passport by a native-born citizen of the United States to an immigration inspector at the Port of Entry into the United States was a use within the scope and meaning of the statute, was unconstitutional and deprived the defendant of his privileges and immunities as a citizen of the United

Grounds of Appeal.

1141

States in violation of the Fifth, Ninth and Tenth Amendments to the Constitution of the United States.

5. That the Court erred in overruling the defendant's objections to admission of evidence on the part of the prosecution throughout the trial.

6. That the Court erred in sustaining objections of the prosecution to questions asked by the defendant.

7. That the Court erred at the close of the Government's case and again at the close of the entire case in denying the defendant's motions to dismiss the indictment and to discharge the defendant upon all the grounds contained in the record.

1142

8. That the Court erred in denying the defendant's requests to charge as submitted to the Court.

9. That the Court erred in its charge to the jury.

10. That the Court erred in denying the defendant's motion in arrest of judgment and to set aside the verdict of the jury as against the law, against the evidence and against the weight of the evidence and upon all other grounds contained in the record.

1143

11. That the sentence of the Court was excessive and illegal.

12. That the foregoing grounds of appeal are not intended and shall not be construed in any way to limit or define the scope of the assignment of errors to be hereinafter duly filed.

1144

Assignments of Error.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA

against

EARL RUSSELL BROWDER,

1145

Defendant.

Now comes defendant, by his attorney, and files the following assignments of error upon which he will rely upon his prosecution of an appeal from the judgment of conviction of this Court made herein on the 22nd day of January, 1940.

1146

FIRST.—The Court erred in denying the motion made on behalf of defendant for a ruling by the Court that the averments in the indictment in respect to Dozenberg and Morris were surplusage (S. M. 3-13).

SECOND.—The Court erred in denying the motion made on behalf of defendant for a ruling by the Court that the averments in the indictment in respect to Dozenberg and Morris were improper upon the ground that they relate to and in effect charge other crimes outlawed by the Statute of Limitations (S. M. 13-14).

THIRD.—The Court erred in denying the motion made on behalf of defendant to dismiss the indictment on the ground that the use to which defendant was charged in the indictment with putting his passport is not a use within

Assignments of Error.

1147

the terms of or contempt, and or prohibited by Section 2 of Title 9 of the Act of June 15, 1917 [Section 220 of Title 22 of the U. S. Code] (S. M. 68-86).

FOURTH.—The Court erred in denying the motion to dismiss the indictment made on behalf of defendant on the ground that the indictment does not charge defendant with making any false statement within the meaning of the said statute (S. M. 2-6, 86-87).

FIFTH.—The Court erred in not holding that the alleged false statement set forth in the indictment was so vague, uncertain and meaningless that no charge of falsity could be predicated upon it (S. M. 86-88).

1148

SIXTH.—The Court erred in denying the motion made on behalf of defendant to dismiss the indictment upon the ground that it appeared upon the face of the indictment that the offense was barred by the Statute of Limitations (S. M. 88-89).

SEVENTH.—The Court erred in denying the motion made on behalf of defendant to dismiss the indictment on the ground that the indictment does not sufficiently set forth any false statement and was so vague and indefinite as not to constitute due process of law under the Fifth Amendment to the Constitution of the United States (S. M. 90).

1149

EIGHTH.—The Court erred in denying the motion made on behalf of defendant to dismiss the indictment on the ground that if the statute (Section 2 of Title 9 of the Act of June 15, 1917, Section 220 of Title 22 of the U. S. Code) is read and interpreted so as to authorize the President and the Secretary of State to prescribe a rule requiring an applicant for a passport to disclose that he had previously obtained a passport illegally and the failure to

1150

Assignments of Error.

make such a disclosure is construed as a false statement within the terms of the said statute and rule, then both the said statute and rule are unconstitutional, and in contravention of the Fifth Amendment to the Constitution of the United States (S. M. 90).

1151

NINTH.—The Court erred in denying the motion made on behalf of defendant to dismiss the indictment on the ground that the application for the renewal of the passport was in effect an application for a new passport and that such renewal application contained no false statement, and an entry by the aid of the renewal so secured was not and could not have been in violation of the said statute (S. M. 91-92).

TENTH.—The Court erred in denying the motion made on behalf of defendant to dismiss the indictment upon the ground that the portion of the said statute with the violation of which the defendant is charged in the indictment, relates solely to aliens and has not and cannot have any application to citizens of the United States (S. M. 92-95).

1152

ELEVENTH.—The Court erred in denying the motion made on behalf of defendant to dismiss the indictment upon the ground that the statement made by defendant if false, was not and could not have been such a statement, that by reason thereof a passport was issued to defendant (S. M. 95-97).

TWELFTH.—The Court erred in denying the motion made on behalf of defendant to exclude all reference to or evidence concerning the Dozenberg and Morris passport applications as immaterial and highly prejudicial to defendant (S. M. 104).

Assignments of Error.

1153

THIRTEENTH.—The Court erred in overruling the objection made on behalf of defendant to the testimony concerning the passport issued in the name of Nicholas Dozenberg on the ground that it was incompetent, irrelevant and immaterial and not within the issues of the case, and highly prejudicial to defendant (S. M. 222-3, 224-5, 227-8, 236, 237, 239, 259-60, 261, 290, 310-11), and also in denying defendant's motion to strike such evidence from the record (S. M. 343, 348-9).

FOURTEENTH.—The Court erred in overruling the objection made on behalf of defendant to the testimony concerning the passport issued in the name of George Morris on the ground that it was incompetent, irrelevant and immaterial and not within the issues of the case, and highly prejudicial to defendant (S. M. 245-6, 247, 259-60, 261, 263, 266-9, 310-11), and also in denying defendant's motion to strike such evidence from the record (S. M. 343, 348, 349-59).

1154

FIFTEENTH.—The Court erred in denying the motion made on behalf of defendant to strike from the record all or specified portions of Government's Exhibits 21, 22, 23, 24 and 25, containing rules and regulations promulgated by the President and the Secretary of State upon the ground that the Secretary of State had no authority to make such rules and regulations (S. M. 340-2).

1155

SIXTEENTH.—The Court erred in denying the motion to dismiss made at the close of the entire case on behalf of defendant upon the ground that the use of the passport established by the evidence was not such a use as is contemplated by Section 2 of Title 9 of the Act of June 15, 1917 [Section 220 of Title 22 of the U. S. Code] (S. M. 343).

1156

Assignments of Error.

SEVENTEENTH.—The Court erred in denying the motion to dismiss made at the close of the entire case on behalf of defendant upon the ground that the Government failed to prove defendant's use of his passport to enter the United States in 1937 and 1938 (S. M. 343-5).

EIGHTEENTH.—The Court erred in denying the motion to dismiss made at the close of the entire case on behalf of defendant upon the ground that the Government had failed to prove any criminal intent (S. M. 345-6).

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NINETEENTH.—The Court erred in denying the motion to dismiss made at the close of the entire case on behalf of defendant upon the ground that the renewal of defendant's passport in 1934 was in effect an application for a new passport and that upon such new application the reference to the original application for the passport was stricken out, and that on such new application there was no false statement (S. M. 346-7).

1158

TWENTIETH.—The Court erred in denying the motion to dismiss made at the close of the entire case on behalf of defendant on the ground that the passport which the defendant is charged with having used in 1937 and 1938 was not issued to him by reason of any false statement within the interment of the statute under which defendant was indicted (S. M. 347-8).

TWENTY-FIRST.—The Court erred in denying the motion to dismiss made at the close of the entire case on behalf of defendant on the ground that the indictment was so vague and indefinite as to deprive defendant of the rights guaranteed him under the Fifth Amendment to the Federal Constitution (S. M. 351-2).

TWENTY-SECOND.—The Court erred in denying the motion made at the close of the entire case on behalf of de-

Assignments of Error.

1159

endant on the ground that the Court's construction of Section 2 of Title 9 of the Act of June 15, 1917 (Section 20 of Title 22 of the U. S. Code), as applied to defendant, was arbitrary and violated his constitutional rights.

TWENTY-THIRD.—The Court erred in denying the motion to dismiss the indictment at the close of the entire case on behalf of the defendant on the ground that since the statement made on the passport application beginning "My last passport was obtained from" and ending "for cancellation" was susceptible of the meaning that defendant had no passport for cancellation at the time of his application in 1934, the Government's failure to establish that defendant had such a passport at that time required the dismissal of the indictment (S. M. 352-3).

1160

TWENTY-FOURTH.—The Court erred in denying the motion to dismiss made at the close of the entire case on behalf of defendant on the ground that the Government had failed to establish that it was induced to issue the passport to the defendant by reason of the alleged false word "None" (S. M. 353).

TWENTY-FIFTH.—The Court erred in denying the motion to dismiss made at the close of the entire case on behalf of defendant on the ground that there was no proof that defendant was in possession of a passport when he made his application for passport on August 31, 1934, and at the time of the renewal, February 2, 1937, and that there was and is nothing in the statute, or rules coming within the intentment of the statute under which defendant is indicted, which proscribes the simultaneous existence of two passports, and that from the evidence it appears that when defendant is alleged to have used his passport in 1937 and 1938 that was the only passport outstanding in his name or possession, so that the Court was required to

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Assignments of Error.

find as a matter of law that defendant did not make use of any false passport wilfully or knowingly (S. M., 353-4).

TWENTY-SIXTH.—The Court erred in denying the motion to dismiss made at the close of the entire case on behalf of defendant on the ground that the offense was barred by the Statute of Limitations because in this case the making of the allegedly false statement and the securing of the passport occurred beyond the period of limitation (S. M. 354).

1163

TWENTY-SEVENTH.—The Court erred in denying the motion to dismiss made at the close of the entire case on behalf of defendant on the ground that the offense was barred by the Statute of Limitations (S. M. 354).

TWENTY-EIGHTH.—The Court erred in denying the motion to dismiss made at the close of the entire case on behalf of defendant on the ground that Section 2 of Title 9 of the Act of June 15, 1917 (Section 220 of Title 22 of the U. S. Code) applies only to aliens or persons not owing allegiance to the United States, whereas the defendant was and is a citizen (S. M. 354-6).

1164

TWENTY-NINTH.—The Court erred in denying the motion to dismiss made at the close of the entire case on behalf of defendant on the ground that there is no law or rule authorized by law requiring defendant to state whether or not a previous passport had ever been issued to him, nor which required defendant to submit his passport for cancellation (S. M. 356).

THIRTIETH.—The Court erred in denying the motion to dismiss made at the close of the entire case on behalf of defendant on the ground that the evidence was insufficient for submission to the jury (S. M. 356).

Assignments of Error.

1165

THIRTY-FIRST.—The Court erred in refusing to charge defendant's requests to charge numbered 22, 23, 24, 25, 26, 27, 28, 29, 30, 33, 35, 36, 39, 40, 47, 48, 49, 50, 51, 53, 55, as follows:

"22. Under the first count of the indictment, the defendant is charged with the use and attempt to use a passport, on the 30th day of April, 1937, for the purpose of gaining entry and admission into the United States at the Port of New York. Under the second count of the indictment, the defendant is charged with the use and attempt to use a passport, on the 15th day of February 1938, for the purpose of gaining entry and admission into the United States at the Port of New York. Each count charges a distinct crime. If the jury find that the use described herein is not such as was contemplated by the statute, then they must acquit" (S. M. 417).

1166

"23. In this connection the jury must take into consideration that a passport is a document which, from its nature and object, is addressed to foreign powers, purporting only to be a request that the bearer of it may pass safely and freely, and is to be considered rather in the character of a political document, by which the bearer is recognized, in foreign countries, as an American citizen, and which, by usage and law of nations, is received as evidence of the fact. It is a document issued by the Secretary of State, or under his authority, by a diplomatic or consular officer of the United States, stating his citizenship and requests for him free passage and all lawful aid and protection during his travels or sojourns in foreign lands" (S. M. 417-8).

1167

"24. It was not the intention of Congress, in enacting Section 220 of Title 22, United States Code, to

1168

Assignments of Error.

punish a person who uses a passport in the manner charged in this indictment" (S. M. 418).

1169

"25. I charge you as a matter of law that the defendant had the absolute right to enter into the United States even though he did not have a passport, provided, however, he could, by means of any satisfactory proof, establish that he is a native-born American citizen, that is, by documents such as a birth certificate, baptismal certificate, or other proof that he was born in the United States. The fact that he may have used a passport for this purpose is not a 'use' as contemplated by Congress in defining the crime" (S. M. 418).

"26. If you should find that the sentence in the application for a passport, executed by the defendant on or about August 31, 1934, which reads as follows:

'My last passport was obtained from

(Insert Washington or location of office abroad)

1170

on _____ and is submitted herewith

(Date)

for cancellation. _____

(Give disposition of

passport if it cannot be located.)'

was interpreted by the defendant to mean that he did not have any passport in his possession to be submitted for cancellation, and that it was not his intention to conceal from the Government the fact that he previously had obtained another passport, then it is your duty to find the defendant not guilty" (S. M. 419).

Assignments of Error.

1171

"27. If the statement in the application for the passport, dated August 31, 1934: 'My last passport was obtained

from _____

(Insert Washington, or location of office abroad)

on _____ and is submitted here-

(Date)

with for cancellation,' could be reasonably interpreted as meaning, 'If you have your last passport, obtained from Washington, or abroad, submit it for cancellation', and the defendant honestly and with good cause, so interpreted the said statement, then the word 'None' was not a false statement, and the defendant cannot be held to have made a false statement" (S. M. 419-20).

1172

"28. The application for the passport was drawn by a Department of the Government and if the statement in the application herein involved is ambiguous, it should be construed strictly in favor of the defendant" (S. M. 420).

"29. Falsity consists in knowingly affirming a condition without probable cause and probable cause must be estimated not from the jury's standpoint but from the defendant's" (S. M. 420).

1173

"30. Although the Government in its indictment charges by quotation from this sentence, 'My last passport was obtained from', and does not complete the sentence as contained in the application blank, which was introduced into evidence by the Government, it is your duty in arriving at a determination of the interpretation of this sentence to read it in its entirety with a view to determining its entire context, and not merely that portion of the sentence which has been quoted in the indictment" (S. M. 420).

1174

Assignments of Error.

"33. If you find that the presentation of the passport on those two occasions was only for the purpose of identifying himself as a citizen of the United States, and not for the purpose of gaining a privilege as is intended by the inherent nature of a passport when used in foreign countries, then you must acquit the defendant. In determining the inherent nature of a passport, you must bear in mind that a passport has no sanctioned use, in law or custom, insofar as an American citizen is concerned, within the Port of New York" (S. M. 421).

1175

"35. A Government immigration inspector has only such authority as is conferred upon him by law. His authority therefore, is limited solely to the exclusion of such aliens who, by law, are not entitled to enter this country. He has no power to exclude an American citizen for any reason whatsoever" (S. M. 421-2).

1176

"36. An American citizen may be guilty of crime, or he may be diseased, or he may be otherwise undesirable, but nevertheless, a Government immigration inspector has no jurisdiction whatsoever to pass upon his right to enter this country. He must, as a matter of law, permit him to enter the country, when satisfied that he is an American citizen" (S. M. 422).

"39. The presentation of a passport to an immigration inspector employed by the United States Government for the purpose of identifying the defendant as an American citizen, is not such a utilization of a passport as is inherent in its nature, and is therefore not a 'use' of such passport within the contemplation of Title 22, Section 220 of the United States Code, as charged in the indictment" (S. M. 422).

Assignments of Error.

1177

"40. Although there has been some testimony introduced by the Government to the effect that the defendant at various times was identified and seen in Moscow, such fact nevertheless must not be considered by you in determining the significance of the use to which this passport has been put. The issue before you is the one that is raised in the indictment. You cannot go outside of the indictment in considering whether the passport was used abroad. You must, therefore, completely disregard the testimony of the witnesses who testified that they saw the defendant in Moscow" (S. M. 423).

1178

"47. If you find that the United States Government, through its agents, had knowledge in 1929 of the fact that defendant had obtained a passport in 1927 under the name of Morris, then you may consider that fact as continuing to exist in the knowledge of the United States Government up until the time that he applied for a passport under the name of Earl Russell Browder. And in that connection, you may consider the testimony of the Government witness, Bell, who testified that there appeared a notation on the Morris application, made in 1929 by a Government employee by the name of Miss Wright, as follows: 'Recorded in Fraud File as suspect, 12/2/29, Wright'. In this connection you may further consider the testimony of the witness, Powers, a Government witness, who testified in answer to the prosecutor's inquiry that he had been visited in 1929 by a Government agent and questioned concerning the Morris application, which the said agent exhibited to him, and questioned further whether Browder could have been Morris; and in spite of this knowledge the Government issued a passport to the defendant in 1934. You are therefore to consider the foregoing in determining whether the

1179

1180

Assignments of Error.

Government was or was not misled by the word 'None' " (S. M. 425).

"48. The alleged false word 'None' in the application for the passport, dated August 31, 1934, must have been the effective cause of inducing or securing the issuance of the passport which was used on April 30, 1937 and February 15, 1938; and if you are not convinced of that beyond a reasonable doubt, then you must acquit" (S. M. 426).

1181

"49. If you find that the word 'None' is no answer to the question 'My last passport was obtained from whom?' then such statement contained in the word 'None' cannot be the basis for the charges in the indictment that the defendant made a false statement in order to obtain the issuance of the passport issued on September 1, 1934; and if you so find, you shall acquit the defendant" (S. M. 426).

1182

"50. If the jury should find that at the time of the issuance of the Earl Russell Browder passport September 1, 1934, the Government had knowledge or reason to believe that accused had prior thereto received a passport, then the jury should find that the Earl Russell Browder passport was not secured by reason of the allegedly false statement 'None' made in the passport application" (S. M. 426).

"51. If the jury should find that at the time of the renewal on February 2, 1937, of the Earl Russell Browder passport issued September 1, 1934, the Government had knowledge or reason to believe that accused had prior thereto received a passport, then the jury should find that the Earl Russell Browder passport was not secured by reason of the allegedly false word 'None'.

Assignments of Error.

1183

made in the passport application; and that in any event whatever impropriety existed in securing the issuance of said passport was rendered harmless and immaterial by such knowledge or notice existing at the time of said renewal" (S. M. 426-7).

"53. If you find that the renewal application, which has been offered by the Government in evidence, executed in 1937, is a separate and distinct application for a passport, even though the physical document brought into being was identical to the original document which he had obtained on the application made in 1934, and if you find that there were no false statements of a material nature contained in such renewal application, then it is your duty to acquit this defendant" (S. M. 427-8).

1184

"55. Although the same section makes it a crime to make a false statement of a willful and material nature in an application for a passport, this is not the part of the section for which the defendant here is on trial. If this is all that the Government proves, you must acquit the defendant" (S. M. 428).

1185

THIRTY-SECOND.—The Court erred in denying the request made on behalf of defendant to submit to the jury as a question of fact (if the Court did not rule as matter of law) that the "use" made by the defendant of his passport did not come within the meaning of Section 2 of Title 9 of the Act of June 15, 1917. Section 220 of Title 22 of the U. S. Code (S. M. 428).

THIRTY-THIRD.—The Court erred in refusing to charge the second sentence of defendant's request to charge numbered 45 as follows:

1186

Assignments of Error.

"Even if you find that the Dozenberg, Morris and Richards passports were illegally obtained and used but on the other hand find that the Earl Russell Browder passport of 1934 was properly obtained and used, then it is your duty to acquit this defendant (S. M. 424, 439).

THIRTY-FOURTH.—The Court erred in charging the jury as follows:

1187

"I do not, however, mean by this statement that you should not consider the testimony with respect to the Dozenberg, Morris and Richards passports insofar as it relates to the issues under the two counts in the indictment which I have already explained to you" (S. M. 440).

THIRTY-FIFTH.—The Court erred in imposing a sentence so severe as two years and One Thousand (\$1,000.00) Dollars on each of the two counts of the indictment to run consecutively.

1188

And by reason of said errors and other manifest errors appearing in the record herein, the defendant prays that the judgment of conviction be set aside and that he be discharged from custody.

Dated, New York, February 7, 1940.

EDWARD KUNTZ,
Attorney for Defendant,
Office & P. O. Address,
100 Fifth Avenue,
Borough of Manhattan,
City of New York

Stipulation as to Record.

1189

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA

against

EARL RUSSELL BROWDER,

Defendant. 1190

IT IS HEREBY STIPULATED AND AGREED, that the foregoing is a correct transcript of the record in the said District Court in the above-entitled matter, as agreed on by the parties.

Dated, New York, February 29, 1940.

JOHN T. CAHILL,
United States Attorney. 1191

EDWARD KUNTZ,
Attorney for Defendant-Appellant.

1192

Clerk's Certificate.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA

against

EARL RUSSELL BROWDER,

Defendant.

1193

I, George J. H. Follmer, Clerk of the United States District Court, for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court, in the above-entitled matter, as agreed on by the parties.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed at the City of New York, in the Southern District of New York, this 29th day of February, 1940.

1194

(Seal)

GEORGE J. H. FOLLMER,
Clerk.

[fol. 399] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT, OCTOBER TERM, 1939

No. 305

(Argued April 15, 1940. Decided June 24, 1940)

UNITED STATES OF AMERICA, Appellee,
against

EARL RUSSELL BROWDER, Defendant-Appellant

Appeal from the District Court of the United States for the
Southern District of New York

Earl Russell Browder was convicted of willfully and
knowingly using a passport secured by false statement.
Affirmed.

Before Swan, Chase and Patterson, Circuit Judges

Walter H. Pollak, Carol King, Benjamin Goldring and
Edward Kuntz, for appellant.

John T. Cahill, Lester C. Dunigan, Frank H. Gordon and
Robert L. Werner, for United States.

[fol. 400] PATTERSON, Circuit Judge:

This appeal raises a point of law, whether the exhibition
of a passport to a United States immigrant inspector as
proof of the appellant's citizenship on his entry into this
country from a trip abroad is a "use" of such passport
within the meaning of 22 U. S. Code, section 220. Section
220, originally section 2 of title IX of the Act of June 15,
1917, reads:

"Whoever shall willfully and knowingly make any false
statement in an application for passport with intent to in-
duce or secure the issuance of a passport under the author-
ity of the United States, either for his own use or the use of
another, contrary to the laws regulating the issuance of
passports or the rules prescribed pursuant to such laws, or
whoever shall willfully and knowingly use or attempt to use
or furnish to another for use, any passport the issue of
which was secured in any way by reason of any false state-

ment, shall be fined not more than \$2,000 or imprisoned not more than five years or both."

The indictment was in two counts. The first charged that the appellant, having obtained a passport by false statement to the effect that he had had no previous passport, used the passport on April 30, 1937 by presenting it to an immigrant inspector to secure entry into the United States. The second count charged the appellant with a similar use of the same passport on February 15, 1938.

At the trial the evidence in behalf of the United States showed that the appellant in August 1934 made written application for a United States passport. The printed form of application contained the clause, "My last passport was obtained from — and is submitted herewith for cancella- [fol. 401] tion." The appellant wrote the word "none" in the blank space and signed the application. There was evidence that actually the appellant had previously applied for and obtained three passports under names other than his own, first in 1921, again in 1927, and again in 1931. On the 1934 application a passport was issued by the Department of State on September 1, 1934. The period of validity, two years, was later extended for an additional two years at the appellant's request. On April 30, 1937 the appellant, returning to this country from a trip abroad, exhibited the passport to one Larsen, an immigrant inspector who boarded the vessel at the port of New York, as proof of his citizenship and right to enter the United States. On February 15, 1938, returning from another trip abroad, he exhibited the passport to another immigrant inspector at the port of New York. The appellant put in no evidence. The case went to the jury, and a verdict of guilty on both counts was returned.

The appellant urges that the exhibition of the passport to an immigrant inspector at the port of New York, while a use of the passport, was not the kind of use prohibited by the statute. The meaning to be attached to the word "use", the argument runs, should be restricted to use abroad, in view of the purpose for which passports are issued and in view of the evil which the statute was designed to eradicate. It is pointed out that production of a passport is not required of a citizen of the United States to reenter the country; other evidence of citizenship will suffice. The argument is not without force. It is quite true that a passport is

primarily for use in travel abroad. A passport "certifies that the person therein described is a citizen of the United States and requests for him while abroad permission to come and go as well as lawful aid and protection." Borchard, *Diplomatic Protection of Citizens Abroad*, p. 493. It has been described as "a document which, from its nature and object, is addressed to foreign powers". *Urtetiqui v. [fol. 402] D'Arcy*, 9 Pet. 692, 699. Similar definitions are given in Moore, *International Law Digest* (1906), p. 856; Hyde, *International Law Chiefly As Interpreted And Applied By The United States* (1922), p. 692; 17 *Opinions Attorney General*, 674. But the sweeping statement that the American passport "has no sanctioned uses, customary or statutory, within the United States", taken from Hunt, *The American Passport* (1898), p. 4, is certainly subject to qualification. A use that is long established and takes place commonly within the United States is the presentation of a passport to foreign consulates here for procurement of visa, in anticipation of travel abroad. See Hunt, p. 5; Hyde, pp. 698-699; Borchard, pp. 504-506; Circular of Department of State, February 8, 1915.

The appellant also refers to regulations of the Department of State in force from 1911 to 1920, to the effect that passports "are intended for identification and protection in foreign countries, and not to facilitate entry into the United States." However it may have been prior to 1920, the Department of State in official publications, "Notice to Bearers of Passports", published at frequent intervals from 1930 to the present time, has recommended the use of passports to facilitate entry into the United States. In these publications the Department of State says: "An American citizen leaving the United States for a country where passports are not required is nevertheless advised to carry a passport, except in travel to Canada and Mexico. The passport may later save the time and inconvenience of applying for one abroad should the holder desire to travel in countries where passports are required. It will also enable the holder to establish his American citizenship upon his return to the United States and thus facilitate his entry." And there is testimony in the case that production of passport is one of the methods used to convince immigrant inspectors of a passenger's American citizenship and consequent right to enter the United States. It cannot be

[fol. 403] doubted, therefore, that in 1937 and 1938 the exhibition of a passport to an immigrant inspector as proof of the bearer's citizenship and right to enter the country from a vessel arriving at New York was a sanctioned and recognized use of a passport.

The words of the 1917 statute are broad,—“whoever shall willfully and knowingly use or attempt to use, or furnish to another for use, any passport the issue of which was secured in any way by reason of any false statement”. Literally, the words cover any and all uses to which a passport might be put. We assume, however, that the statute goes no further than to forbid the use of a passport obtained by false statement as a credential of citizenship in the ways to which regular passports are commonly put. We also assume that in 1917 the use of a passport to prove citizenship on entry into this country had not become customary. The fact that is decisive of the point of law raised by the appellant is that such a use was a sanctioned and recognized use in 1937 and in 1938, when the acts charged in the indictment occurred. The meaning of a statute does not change save as it may be amended; but a statute is prospective and its application to a given state of facts may change as new things or new uses of old things come into existence. See *De Lima v. Bidwell*, 182 U. S. 1; *Puerto Rico v. Shell Co.*, 302 U. S. 253; *Maxwell on Interpretation of Statutes* (6th Ed.), pp. 144-145. As we read the statute, it forbids putting passports obtained by false statement to any of the uses to which passports regularly issued may be customarily put. The production of a passport to an immigrant inspector as proof of the bearer's citizenship and right to enter the country having become a sanctioned and recognized use of a passport prior to the times charged in the indictment, we are of opinion that such a use of a passport obtained by false statement constitutes a violation of the act, provided the use in a particular case was a wilful and knowing one.

The appellant's argument as to the evil which the act [fol. 404] was designed to overcome, the fraudulent use of passports in 1914-1917, does not persuade us that the act was intended to apply solely to the misuse of American passports in foreign lands. Another argument is that use of an expired passport, in effect forbidden under section 4 of the same title, would not include use of an expired passport to identify an American citizen reentering this

country, and in this connection it is claimed that use of expired passports by citizens returning from Canada and Bermuda is countenanced by immigrant inspectors. We have no way of knowing whether that use of expired passports is prevalent, and we see no need of passing on the legality of such a practice.

The contention is also made that the trial judge erred in denying a motion to dismiss at the close of the case on the ground that as matter of law there was no willful and knowing use of the passport. On the evidence it was for the jury to say whether the appellant's use of the passport was a willful and knowing use, and denial of the motion to take that issue from the jury was not erroneous. The trial judge explained the meaning of the words in his charge, and the appellant took no exception to the definition and did not ask that a more particular exposition be given. We cannot condemn the charge for not being more specific when no exceptions raising the point were taken. *Greater New York Live Poultry Chamber of Commerce v. United States*, 47 F. (2d) 156 (C. C. A. 2). Complaint is also made of refusal of requests to charge. Whatever was essential in the requests was adequately covered in the charge as given.

Affirmed.

[fol. 405] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND
CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of June, one thousand nine hundred and forty.

Present: Hon. Thomas W. Swan, Hon. Harrie B. Chase,
Hon. Robert P. Patterson, Circuit Judges.

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

EARL RUSSELL BROWDER, Defendant-Appellant

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. Roberts, Clerk.

[fol. 406] [Endorsed:] United States Circuit Court of Appeals, Second Circuit, United States of America v. Earl Russell Browder, Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed June 28, 1940. D. E. Roberts, Clerk.

[fol. 407] UNITED STATES OF AMERICA, SOUTHERN DISTRICT OF NEW YORK

I, D. E. Roberts, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 406, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of United States of America, Plaintiff-Appellee, against Earl Russell Browder, Defendant-Appellant, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 1st day of July, in the year of our Lord one thousand nine hundred and forty, and of the Independence of the said United States the one hundred and sixty-fourth.

D. E. Roberts, Clerk: (Seal.)

[fol. 408] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Murphy took no part in the consideration and decision of this application.

(1700)

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FILED

JUL 29 1940

CHARLES ELMORE BRODREY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 287

EARL RUSSELL BROWDER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT AND BRIEF IN SUP-
PORT THEREOF.**

WALTER H. POLLAK,
Counsel for Petitioner.

**WALTER H. POLLAK,
CAROL KING,
BENJAMIN GOLDRING,**
Of Counsel.

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INDEX.

SUBJECT INDEX.

	Page
Petition for writ of certiorari	1
Summary statement of the matter involved	1
Questions presented and reasons relied on for the allowance of the writ	2
Prayer for writ	3
Jurisdiction	5
Brief in support of petition for writ of certiorari	5
Opinion of the court below	5
Jurisdiction	5
Abstract of case	6
There was no "use"	8
There was no wilfulness	20
Conclusion	26

TABLE OF CASES CITED.

<i>Apex Hosiery Co. v. Leader</i> , 84 L. Ed. (Adv.) 913	2
<i>Armour Packing Co. v. United States</i> , 209 U. S. 56	20
<i>Claus v. Chicago G. W. R. Co.</i> , 136 Iowa 7, 111 N. W. 15	22
<i>Clay v. State</i> , 52 Tex. Crim. Rep. 555, 107 S. W. 1129	22
<i>Com. v. Kneeland</i> , 20 Pick. 220	23
<i>De Lima v. Bidwell</i> , 182 U. S. 1	12
<i>Evans v. United States</i> , 153 U. S. 584	20, 24
<i>Felton v. United States</i> , 96 U. S. 699	20, 22, 23
<i>Horning v. District of Columbia</i> , 254 U. S. 135	24
<i>Lynch v. Com.</i> , 131 Va. 762; 109 S. E. 427	22
<i>Murdock v. United States</i> , 62 F. (2d) 926	23
<i>People v. Jewell</i> , 138 Mich. 620, 101 N. W. 835	20, 22
<i>Potter v. United States</i> , 155 U. S. 438	24
<i>Puerto Rico v. Shell</i> , 302 U. S. 253	13
<i>Roby v. Newton</i> , 121 Ga. 679, 49 S. E. 694, 68 L. R. A. 601	22
<i>Spurr v. United States</i> , 174 U. S. 728	20, 22, 23, 24
<i>State v. Harwell</i> , 129 N. C. 550, 40 S. E. 48	22
<i>State v. Morgan</i> , 136 N. C. 628, 48 S. E. 670	22
<i>State v. Savre</i> , 129 Iowa 122, 105 N. W. 387, 3 L. R. A. (N. S.) 455, 113 Am. St. Rep. 452	22
<i>St. Louis, I. M. & S. R. Co. v. Batesville & W. Tel. Co.</i> , 80 Ark. 499; 97 S. W. 660	22

	Page
<i>St. Louis & S. F. R. Co., v. United States</i> , 169 Fed. 69	20, 23, 25
<i>United States v. Atlantic Coast Line R. Co.</i> , 173 Fed. 764	20
<i>United States v. Britton</i> , 108 U. S. 193	20
<i>United States v. Illinois Central R. Co.</i> , 303 U. S. 239	2, 20, 23
<i>United States v. Lehigh Valley R. Co.</i> , 204 Fed. 705	25
<i>United States v. Murdock</i> , 290 U. S. 389	2, 20, 23
<i>United States v. Philadelphia & R. R. Co.</i> , 223 Fed. 207	22
<i>Urtetiqui v. D'Arcy</i> , 9 Pet. 692	11
<i>Wales v. Miner</i> , 89 Ind. 118	22
<i>Williams v. People</i> , 26 Colo. 272, 57 Pac. 701	22, 23
<i>Yates v. Jones National Bank</i> , 206 U. S. 158	23

STATUTES CITED.

Act of June 15, 1917 (22 U. S. C. 220) Title IX,	
Section 2	2, 6, 8
3	8, 9
4	8, 9
Judicial Code, Section 240 (a) as amended by the Act of February 13, 1925 (28 U. S. C. 347)	2, 5
22 U. S. C. 217a	6
220	6, 8
221	8
222	8
22 U. S. C. 223-226	18
22 U. S. C. 223c	18
22 U. S. C. 224	18
22 U. S. C. 225	18
22 U. S. C. 227	18

OTHER AUTHORITIES CITED.

Annual Report of Atty. Gen. 1915, p. 44	16
1916, p. 54	16
1917, pp. 52-53	16
1917, p. 73	15
Borchard, <i>Diplomatic Protection of Citizens Abroad</i> , N. Y. (1916), p. 493	11
65 Cong. Rec. 1st Sess., p. 3439, June 11, 1917	15
Department of State Rules promulgated June 1, 1915	12

INDEX

iii

Page

Department of State Rules promulgated March 31, 1938, Rule 125 (3 F. R. 681)	14
Dep't of State, The American Passport (Gaillard Hunt, ed., 1898), p. 4	11
3 Dig. of Int. Law, p. 858	14
Hearing before House Committee on Foreign Affairs (66:1 House Com. on Foreign Affairs, Extension of Passport Control, Hearings on H. J. Res. 205 and H. R. 9782, Oct. 1919, p. 33)	19
65:2 H. Rep. 485 on H. R. 10264, Apr. 12, 1918, p. 2, serial No. 7307	17
Letter of Jan. 20, 1915 from Secretary of State Bryan to the Chairman of the Senate Committee on Foreign Relations, in European War, No. 2, Oct. 21, 1915, pt. VI, at p. 61, and in For. Rels., 1914 Sapp., at p. xii	16
Letter of Aug. 18, 1916 from State Dep't Counselor (Frank L. Polk) to Rep. John J. Fitzgerald, in For. Rels., 1916 Sapp., at p. 8	16
Maxwell on Interpretation of Statutes (6th ed. pp. 144-5)	12
2 Moore Int. Law Digest 266	11
14 Op. Atty. Gen. 281, 285 (1873)	11
Presidential passport rules of June 7, 1911, rule 4, par. 3	12
Nov. 13, 1914, rule 4, par. 3	12
Jan. 12, 1915, rule 5, par. 3	12
Dec. 17, 1915, rule 6, par. 2	12
April 17, 1916, rule 6, par. 2	12
Jan. 24, 1917, rule 6, par. 2	12
U. S. Committee on Public Information, German plots and intrigues in the U. S. during the period of our neutrality, Red, White and Blue series, No. 10, July, 1918; at pp. 35-38	16
War Memoirs of Robert Lansing (1935), p. 63 <i>et seq.</i>	16
65	17
73	15
73-75	16
74-79	16
79-80	16

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 287

EARL RUSSELL BROWDER,

vs.

Petitioner,

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

To the Supreme Court of the United States:

Your petitioner, Earl Russell Browder, respectfully alleges:

A.

Summary Statement of the Matter Involved.

Petitioner,—a citizen of the United States—was convicted of “wilfully and knowingly using” a passport obtained by false statement. The “use” charged is the presentation of the passport to immigration inspectors upon the citizen’s return to the United States in 1937 and again in 1938.

Petitioner was sentenced to four years in jail—two years on each of two counts—and fined \$2,000. He is now on bail.

Petitioner was convicted after trial in the New York Southern District Court before Judge Coxe and a jury. The Second Circuit Court of Appeals affirmed the conviction June 24, 1940. The mandate was stayed June 28, 1940.

Judge Patterson's opinion notes the novelty and difficulty of the issue.

B.

Jurisdiction.

Petitioner was convicted of violating Section 2 of Title IX of the Act of June 15, 1917 (22 U. S. C. §220). This Court's jurisdiction rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. §347).

C.

Questions Presented and Reasons Relied on for the Allowance of the Writ.

1. The statute punishes passport "use". Many considerations—the context; the historic quality of a passport; the evil sought to be remedied—establish that the use is use in foreign travel. It is not a casual employment of the document by a citizen—in this instance a native citizen—to establish his right to return. The result in the courts below violates the settled rule of the construction of penal statutes. (*Apex Hosiery Co. v. Leader*), 84 L. Ed. [Adv.] 913).

2. The courts below construed "wilfully and knowingly" in conflict with flat authority in this Court. (*U. S. v. Murdock*, 290 U. S. 389, collecting authorities; *U. S. v. Illinois Central R. Co.*, 303 U. S. 239, 242-3). Against a motion to dismiss they permitted and upheld a finding of "wilfulness" despite the total absence of evidence of improper purpose.

WHEREFORE your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the Circuit Court of Appeals for the Second Circuit, commanding said court to certify and send to this Court a complete transcript of the record and all proceedings had in said Circuit Court of Appeals for the Second Circuit in the case there entitled United States of America, plaintiff-respondent, against Earl Russell Browder, defendant-appellant; and that said case may be reviewed and determined by this Court and the decision therein finally reversed; and that your petitioner may have such other or further relief or remedy in the premises as to this Honorable Court may seem appropriate.

Respectfully submitted,

EARL RUSSELL BROWDER,
By WALTER H. POLLAK,
Attorney.

Dated July 26, 1940.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 287

EARL RUSSELL BROWDER;

against

Petitioner,

THE UNITED STATES OF AMERICA.

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI.**

I.

Opinion of the Court Below.

The opinion has not yet been reported. It appears at
R. 399-403.

II.

Jurisdiction.

1.

The statutory provision is Jud. Code, § 240(a) (28 U. S.
C. § 347) as amended by the Act of February 13, 1925, 43
Stat. 938.

2.

The date of the order for mandate was June 28, 1940
(R. 403).

III.

Abstract of Case.

Browder was convicted of violating § 2 of Title IX of the Act of June 15, 1917 (§ 220 of Title 22, entitled Foreign Relations and Intercourse—of the U. S. Code).

“ * * * *Use of passport obtained by false statement; penalty* * * * whoever shall willfully and knowingly use or attempt to use * * * any passport the issue of which was secured in any way be reason of any false statement, shall be fined not more than \$2,000 or imprisoned not more than five years or both.” *

The indictment is in two counts (R. 2-5):

The *first* count charges that on April 30, 1937, Browder, within the Southern District of New York, wilfully and knowingly used and attempted to use a passport issued September 1, 1934, in his name, by presenting it to an immigration inspector. Browder had obtained this passport “by reason of a false statement made in the application therefor.” In reply to a statement in the application blank—“ ‘my last passport was obtained from’ ”—he inserted “ ‘none.’ ”

The *second* count charges a like misuse of the same passport on a different day, February 15, 1938.**

The government proved that Browder made the insertion in his passport application; that he had had other passports in other names; that when he returned to the United States on April 30, 1937, and February 15, 1938, he showed

* For Title IX in its full form, see Appendix pp. 2-4.

** The passport Browder is charged with misusing was on each occasion a renewed passport (indictment, R. 2, 4). The original passport was issued September 1, 1934 (R. 2, 4). By its terms (R. 316)—pursuant to 22 U. S. C. §217a (Appendix p. 16)—it expired at the end of two years, September 1, 1936. It could be renewed for another two years (Appendix p. 16). February 2, 1937, it was (R. 2, 4).

the passport to immigration inspectors who passed him as a returning citizen (R. 119, 125).

Browder was born in Wichita. "He is and always has been a native citizen of the United States" (stipulation, R. 347).

Browder moved to dismiss the indictment at the opening of the case (R. 15) and again after the evidence was in (R. 226-9, 235). Both motions were denied (R. 25, 33, 36, 227, 228, 229, 235), exception taken to both denials (R. 33, 35, 36, 230, 235, 236), and error assigned upon such denials (R. 382-3, 385, 386, 388). The denial of these motions was error which, we shall demonstrate, this Court should review:

(I) There was no use.

(II) There was no wilfulness.

I.

"THERE WAS NO "USE"

A citizen of the United States returns to the United States. His right to enter is unqualified. The immigration service cannot hinder him. Once the service learns of his citizenship its concern with the citizen is at an end (R. 122, 128). There are many ways in which citizenship may be established. One of them is to show an American passport. The citizen does show it to an immigration inspector. The courts below hold this casual employment of a passport to be—within the meaning of a penal statute—a "use." *

The holding contradicts administrative practice under cognate Sections; overlooks the intrinsic quality of a passport; ignores the evil the statute was designed to remedy; disregards the historical facts that not until 1918 did Congress adopt any control over "entry" by citizens and that in 1921 Congress allowed that control to expire.

Sections 2, 3 and 4 are cognate. The showing of a passport to an immigration inspector is manifestly not a "use" within Sections 3 and 4, and cannot be a use under Section 2.

Sections 2, 3 and 4 of Title IX—respectively 22 U. S. C. §§ 220, 221, 222—are cognate:

Section 2 punishes "use" of a passport obtained by false statement.

Section 3 punishes "use" of a passport in violation of the conditions, restrictions, and rules the passport contains.

* The basic rulings were the rulings denying the motions to dismiss at the opening and at the close of the case. Consistently with these rulings Judge Coxe refused numerous requests to charge. Among others he refused a request which called attention to the "inherent nature of a passport" as "used in foreign countries" and which declared

"that a passport has no sanctioned use, in law or custom, insofar as an American citizen is concerned, within the Port of New York" (33d request included in Thirty-first assignment, R. 392, for exception see R. 300).

Section 4 punishes "use" of a passport "which has become void by the occurrence of any condition therein prescribed invalidating the same."

Administrative practice certifies that a citizen's showing of his passport to an immigration inspector is not a use within the meaning of §3 or §4:

The "use" of an expired passport is pretty clearly a crime under §3; it is a "violation of the conditions or restrictions therein [in the passport] contained, or of the rules prescribed pursuant to the laws regulating the issuance of passports, which said rules shall be printed on the passport" (see the abstracts from passport regulations appearing in Browder's passport, Gov. Ex. 5, R. 330). The "use" of an expired passport is certainly a crime under §4; such a passport "has become void". (Circular instruction of March 26, 1923, Appendix p. 21).

Now it is clear that a citizen who—in order to establish his citizenship—upon returning to the United States shows an expired passport to an immigration inspector has not "used" the passport; has not violated §3 or §4; has not committed any offense of any kind. The thing is done all the time. American citizens returning from Canada, say, or Bermuda, present expired passports to show that they are citizens.

And not only citizens returning from short trips to neighboring lands employ expired passports to establish their citizenship. The *New York Times* of July 19, 1940, describing the arrival of the *Manhattan* from Lisbon in New York Harbor, says (p. 10, col. 1)

"The American passengers were predominantly long-time residents of Europe, and immigration men said that faded and outdated passports, some as old as twenty and thirty years, were turned in at the immigration tables where passengers were gathered."

The immigration service does not prosecute these returning Americans who have travelled in this hemisphere or have long lived in the other. It does not condemn the practice of presenting expired passports. On the contrary it recognizes the practice as a convenient mechanical means of establishing what the service wants to know,—that the persons who present these passports are citizens and that the service therefore has no concern with them.

The court below rejects the consideration of this practice. Its point (R. 403) is that there is no formal proof of the practice. There is no need of formal proof. Courts judicially notice long-established and widespread custom. Particularly they notice established administrative practice.*

Sections 3 and 4 confirm that "use" is concerned with employment of a passport to attain ends that cannot be attained otherwise than by the passport. "Use" is addressed to employment of the passport not upon a citizen's return to this country but in connection with travel abroad. These things are clear upon their face and from their context. They are more clear when it is remembered that the penalty—if even the fine is disregarded—is 5 years in prison. It cannot be that Congress intended to impose such a penalty upon the employment by a citizen of a passport—defective in some respect not concerned with citizenship—to prove the true fact of citizenship.

* The practice under consideration was assumed as familiar by Mr. Flournoy, division chief of the Department of State, testifying at a hearing before the House Committee on Foreign Affairs (66:1 House Com. on Foreign Affairs, Extension of Passport Control, Hearings on H. J. Res. 205 and H. R. 9782, Oct. 1919, p. 33):

He referred to Americans "who have been living in alien countries for many years" and who "arrive at the ports with old passports".

.

A passport's function is in connection with travel abroad.

"The issuing of passports is a convenient system adopted by States to secure for their citizens a right of transit through foreign countries" (Borchard, *Diplomatic Protection of Citizens Abroad*, N. Y. [1916], p. 493, our ital.). A passport "is a document, which, from its nature and object, is addressed to foreign powers" (*Urtetiqui v. D'Arcy*, 9 Pet. 692, 699, our ital.). A passport "certifies that the person therein described is a citizen of the United States and requests for him while abroad permission to come and go as well as lawful aid and protection" (Borchard, *supra*, our ital.). A passport "is intended only for use abroad, and has no sanctioned uses, customary or statutory, within the United States in time of peace" (Dep't of State, *The American Passport* [Gaillard Hunt, ed., 1898], p. 4, our ital.).*

The court below found the statement by Mr. Gaillard Hunt too "sweeping" (R. 401). "A use that is long established and takes place commonly within the United States is the presentation of a passport to foreign consulates here for procurement of visa, in anticipation of travel abroad." This is true: And the court's own citation of Mr. Hunt's work shows that Mr. Hunt did not overlook the fact. But this use while not literally "abroad" is on the court's own correct statement for the purpose "of travel abroad." It is not employment by a citizen returning to the land of his citizenship.**

* Défendant requested a charge in essence verbally identical; the court refused it; defendant excepted; defendant assigned the ruling as error (R. 283, 300, 389).

** The statement by Mr. Hunt, that we quoted and that the court criticized, may be regarded as literally correct. "For many purposes" a foreign consulate is part of the territory of the country the consul represents (14 Op. Atty. Gen. 281, 285 [1873]; 2 Moore Int. Law Digest 266).

"Passports issued by the Department of State or its diplomatic or consular representatives are intended for identification and protection in foreign countries, and not to facilitate entry into the United States. * * *." So it was written in the executive regulations promulgated January 24, 1917, and in effect June 15, 1917, when § 2 was enacted. So, before that date, it had been declared in one set of executive regulations after another.*

The 1917 executive regulations did more than establish that passports were not "to facilitate entry into the United States." They explained why: the sentence we quoted adds the words "immigration being under the supervision of the Department of Labor."**

The court below leaves it unchallenged that in 1917 "use" meant utilization in connection with travel abroad. It "assumes that in 1917 the use of a passport to prove citizenship on entry into this country had not become customary" (R. 402). It finds the "decisive" "fact" that such a use—use on return to this country—was a recognized and sanctioned use when the acts charged in the indictment occurred. The court cites *Maxwell on Interpretation of Statutes* (6th ed., pp. 144-5), *De Lima v. Bidwell*, 182 U. S.

* Presidential passport rules of: June 7, 1911, rule 4, par. 3; Nov. 13, 1914, rule 4, par. 3; Jan. 12, 1915, rule 5, par. 3; Dec. 17, 1915, rule 6, par. 2; April 17, 1916, rule 6, par. 2; Jan. 24, 1917, rule 6, par. 2.

** Department of State rules (Appendix p. 20), promulgated June 1, 1915, governed the granting and issuing of passports to aliens who had declared their intention of becoming citizens (pursuant to § 1 of the Act of March 2, 1907, repealed by § 5 of the Act of June 4, 1920 [Appendix pp. 1, 12]). In accord with the principle applicable to passports generally the Secretary declares:

"A passport may be granted to a declarant under the statutory provision quoted above for purposes of identification, and protection in foreign countries, other than his country of origin, but not for the purpose of facilitating reentry into this country. All matters relating to immigration being under the supervision of the Department of Labor, any inquiries concerning the right to reenter the United States should be addressed to that Department" (Appendix p. 20, see also p. 19).

1, *Puerto Rico v. Shell*, 302 U. S. 253. Mr. Maxwell declares

"the language of a statute is generally extended to new things which were not known and could not have been contemplated by the legislature when it was passed. This occurs when the Act deals with a genus, and the thing which afterwards comes into existence is a species of it."

The *De Lima* and the *Puerto Rico* cases decide that statutory references to "territories" came to include Puerto Rico when Puerto Rico became a territory. The principle is beyond debate, at least where the statute is civil. But the principle can have no application. In 1937 or 1938 there was no recognition—legislative or executive—of passport presentation to an immigration inspector as "use." There was no requirement that any citizen returning to this country employ a passport for the purpose, or have a passport. All that happened was that, beginning in 1930, the Department of State in its Notice to Bearers of Passports "advised" the citizen to carry a passport except in travel to Canada and Mexico. The citizen was informed that the having of a passport might "save the time and inconvenience of applying for one abroad should the holder desire to travel in countries where passports are required." The citizen was further "advised"—and this is the point of the court's quotation (R. 401)—that the passport "will also enable the holder to establish his American citizenship upon his return to the United States and thus facilitate his entry." The State Department on numerous occasions did give this perfectly correct advice.

But the advice did not found a "use." The practice of employing documents whose "use" as passports was forbidden was unaffected. Citizens went right on presenting

expired passports—the “use” of which the statute made criminal—for the purpose of showing their citizenship. This was the practice—the “custom”—that the immigration service in 1937 and 1938 continued to “sanction and recognize.” *

The problem is of the meaning of “use” in a passport statute enacted in 1917 and alleged to have been violated two decades later:

In 1917 there was no requirement that a citizen entering the United States have a passport.** In 1934 when Browder obtained his original passport there was no such requirement. In 1937 when he obtained his renewal—and when he made the first presentation to an immigration inspector—there was none. In 1938 when he made the second presentation there was none.

In 1917 there was no requirement even that an *alien* entering this country have a passport from any country. What Judge John B. Moore wrote (3 Dig. of Int. Law, p. 858) in 1906 remained true in 1917:

“There is neither law nor regulation in the United States requiring those who resort to its territories to produce passports.”

* It appears that rules promulgated by the Department of State, March 31, 1938—less than a year after the first alleged offense, about a month after the second—illustrate the Department’s instinctive recognition that passport use was use abroad. Rule 125 of that date (3 F. R. 681, Appendix p. 18) reads:

“Should a person to whom a passport has been issued knowingly use or attempt to use it in violation of the conditions or restrictions contained therein or of the provisions of these rules, the protection of the United States may be withdrawn from him while he continues to reside abroad.”

** As appears *infra* p. 17 such a requirement was imposed in 1918 and done away with in 1921.

The evil Title IX was designed to remedy was the misuse of American passports abroad.

The evil existing in 1917—the evil Title IX was designed to remedy—was the misuse of American passports abroad.* Title IX was enacted two months after the United States went to war.** It was the product, however, not of our belligerency but of our neutrality. As Senator Overman, who had charge of the bill that included Title IX, explained,—“most of the bill was framed before the [American participation in] war and it only affected neutrality” (65 Cong. Rec. 1st sess., p. 3439, June 11, 1917; see also Annual Report of Atty. Gen. 1917, p. 73).

During our period of neutrality passport abuses were flagrant and notorious. German and Austrian army officers and reservists obtained American passports in order to return to Germany and Austria. Agents of the Central powers obtained American passports in order to enter Allied countries. With these false passports these aliens passed through the Allied fleets and returned to their own countries to fight, or entered the Allied countries to spy. Writing of activities of “German and Austrian officials in the United States * * * in violation of the laws of this country and contrary to the usage and practice of officials and individuals of belligerent nationality while residing in the territory of a neutral nation and enjoying its hospitality,” Secretary Lansing says (War Memoirs of Robert Lansing [1935] p. 73):

“Chief among these acts was the improper use of passports issued by the United States and by other neutral countries to secure the safe passage of Germans through the enemy’s lines of blockade to ports in

* The Supplement describes the system of passport control during our period of neutrality, and shows that it was concerned with outgoing travellers only.

** Title IX came to be part of a consolidated measure affecting various aspects of our foreign relations.

neutral territory adjacent to Germany, which was their ultimate destination."

It was because of their involvement in passport frauds that the German diplomatic officials—Captain von Papen and Captain Boy-Ed—were sent home (*ibid.* pp. 74, 79).

Aliens, without right, obtained American passports in several ways—transfer from American citizens who sided with the Central powers; purchase; forgery; theft; lying to the State Department.* Writing of the "passport mill," and the activity of "perjurers and forgers," Mr. Lansing says (p. 74) "three methods were resorted to":

"making of false affidavits and oaths as to birth and nationality, with which to obtain genuine passports; the purchase of passports duly issued to American citizens; and the forging of passports and other documents together with the reproduction of official seals; water-marked paper, engraved insignia and other evidences of genuineness."

It was not only foreigners that misused American passports. Americans—in the interest of the Central powers—did so too. Misuse by Americans too was misuse abroad. The incident of the American war correspondent, Archibald, carrying messages to the Central powers for Doctor Dumba, the Austro-Hungarian Ambassador, remains fa-

* The contemporaneous official source material includes: letter of Jan. 20, 1915 from Secretary of State Bryan to the Chairman of the Senate Committee on Foreign Relations, in *European War*, No. 2, Oct. 21, 1915, pt. VI, at p. 61, and in *For. Rels.*, 1914 Supp., at p. xii; same charge repeated in letter of Aug. 18, 1916 from State Dep't Counselor (Frank L. Polk) to Rep. John J. Fitzgerald, in *For. Rels.*, 1916 Supp., at p. 8; *Annual Reports of Atty. Gen.* 1915, p. 44, 1916, p. 54, 1917, pp. 52-53; see also *N. Y. Times Indices* for the period in question.

Semiofficial literature includes: *War Memoirs of Robert Lansing* (1935), pp. 63 *et seq.* 73-5, 79-80; U. S. Committee on Public Information, *German plots and intrigues in the U. S. during the period of our neutrality*, Red, white and blue series, No. 10, July 1918, at pp. 35-38.

mous. The incident culminated in Secretary Lansing's saying to Doctor Dumba (*War Memoirs*, p. 65):

" 'And now, Mr. Ambassador, please answer this question: Do you think it proper for a diplomatic representative of a belligerent government in the United States to employ an American citizen traveling under the protection of an American passport as a messenger to carry official dispatches through the lines of the enemy?' "

The control Title IX—and Section 2 particularly—set up, was a control appropriate to the evil the title and section were designed to overcome. It was not a control over returning Americans. It was not even a control over entering aliens. It was a control over persons leaving America for the warring countries of Europe.*

In 1918 Congress imposed—and in 1921 Congress allowed to expire—the requirement that a citizen have a passport in order to "enter the United States."

* The clear historical record from the fall of 1914 up to and through June 1917 thus is that the legislation enacted in that month was concerned solely with travel abroad, not with entry. Consider now the historical record *after* June 1917:

With the Act of June on the books—the Attorney-General ruled that the President and executive departments had no power to curb the entry into the United States of citizens or even of—non-enemy—aliens.** At the end of 1917 the Attorney-General in his annual report and the

* The court below does not dispute this (R. 402).

** See 65:2 H. Rep. 485 on H. R. 10264, Apr. 12, 1918, p. 2, serial No. 7307.

President in a message urged Congress to enact legislation controlling entry in war-time. In 1918 Congress passed law establishing war-time control of entry by citizens and aliens (22 U. S. C. §§ 223-226):*

Section 224 made it

"unlawful for any citizen of the United States to depart from or *enter* or attempt to depart from or *enter* the United States unless he bears a valid passport."

Section 223c made it unlawful for any alien

"knowingly to make any false statement in an application for permission to depart from or *enter* the United States with intent to induce or secure the granting of such permission * * *"

The Act of 1918 was a war statute. It emphasized its war character by imposing penalties running up to twenty years (22 U. S. C. § 225, Appendix p. 7). As a war statute it expired in 1921.

The Secretary of State had, before the expiration, requested Congress to continue the provisions regulating passport use upon entry. Congress did continue to demand the production of passports by *aliens* entering the United States. It allowed the Act of 1918 to lapse in its relation to *citizens*. The Act of March, 2, 1921 (22 U. S. C. § 223, Appendix p. 13) enacts:

"The provisions of the Act approved May 22, 1918, shall, in so far as they relate to requiring passports and visés from *aliens* seeking to come to the United States, continue in force and effect until otherwise provided by law."

For two decades—since 1921—there has been no law "relating to requiring passports" from *citizens* returning to

* The sections appear in the Appendix pp. 5-7.

the United States. There has been no law regulating the entry of *citizens*.*

*An additional illustration of the deliberateness of Congress' refusal to impose upon citizens a requirement of passport production upon their return to the United States is supplied by still another act of November 10, 1919 (Appendix pp. 8-10):

In contemplation of the expiration of the Act of 1918 by virtue of the approaching formal conclusion of peace, the Secretary of State in 1919 made the request, mentioned in the text, for the continuation in peace time of control over entry by both citizens and aliens. But Congress rejected the Secretary's recommendation in its relation to citizens; instead, it adopted the Act of November 10, 1919 providing that, if the President so proclaimed, such control should continue, solely with respect to aliens, upon expiration of the Act of 1918 and until March 4, 1921.

The 1918 Act, before its expiration, was, as we have noted, extended with respect to aliens by the Act of March 2, 1921. The 1919 Act thus never became operative.

See generally, as to these matters, 66:1 House Comm. on Foreign Affairs, Extension of Passport Control, Hearings on H. J. Res. 205 and H. R. 9782, Oct. 1919, 66:1 Cong. Rec., p. 6971; 66:1 H. Rep. 382, serial No. 7593.

II.

THERE WAS NO "WILFULNESS"

In 1934 Browder applies for a passport. He fills in a blank with a word that the jury finds false. The falsity has nothing to do with citizenship: the statement in the passport application, "I solemnly swear that I was born at Wichita, Kansas" (Gov. Ex. 2, R. 305), is exactly—admittedly—correct (Gov. Ex. 17, Stipulation, R. 347, quoted *supra* p. 7). In 1936 the passport expires. In 1937 Browder applies for renewal. Renewal is granted.

In 1937 and in 1938, Browder, as a handy way of showing his citizenship, presents his passport. Assuming the presentation is a "use", these presentations cannot be "wilful":

Wilfulness requires "wrongful intent" (*Spurr v. United States*, 174 U. S. 728, 735), "bad intent" (*Felton v. United States*, 96 U. S. 699, 702), "evil design" (*Evans v. United States*, 153 U. S. 584, 594), "bad faith or evil intent" (*United States v. Murdock*, 290 U. S. 389, 398), "a purpose to evade the laws" (*Felton v. United States*, 96 U. S. at 704). Wilfulness is "absolutely inconsistent with an honest purpose" (*Evans v. United States*, 153 U. S. 584, 594, commenting upon *United States v. Britton*, 108 U. S. 193).*

* The cases cited define wilfulness "when used in a criminal statute" (*United States v. Murdock*, 290 U. S. at 394), including a penal statute (*Felton v. United States*; *St. Louis & S. F. R. Co. v. United States*, 169 Fed. 69 [C. C. A. 8, Van Devanter, Cir. J.]). When used in a statute concerned with *malum prohibitum* merely, the word "wilfully" may mean more, or not much more, than "intentionally" or "deliberately." As to this distinction see *United States v. Atlantic Coast Line R. Co.*, 173 Fed. 764, 767 (C. C. A. 4), analyzing authorities including *Armour Packing Co. v. United States*, 209 U. S. 56, 85; *United States v. Illinois Central R. Co.*, 303 U. S. 239, 242-3; *People v. Jewell*, 138 Mich. 620, cited in *United States v. Murdock*, 290 U. S. at 394.

United States v. Murdock is the unanswerable authority:

The relevant statute required wilfulness only—not wilfulness and knowledge; it was less stringent than the statute at bar (see *infra*, p. 21). The statute in the *Murdock* case proscribed the crime of “wilfully failing to * * * supply * * * information” demanded of a taxpayer (392).^{*} *Murdock* “refused to disclose the name of the payee” of “sums deducted by him” (393).^{**}

“The respondent offered no evidence” (290 U. S. at 393). The trial court told the jury of his belief “‘that the Government has sustained the burden cast upon it by the law and has proved that this defendant is guilty in manner and form as charged beyond a reasonable doubt’ ” (393). The court furthermore denied (393) a requested charge: “‘If you believe that the reasons stated by the defendant in his refusal to answer questions were given in good faith and based upon his actual belief, you should consider that in determining whether or not his refusal to answer the questions was wilful.’ ”

At this Court saw (290 U. S. 394), the conviction could not be supported “unless the word ‘willfully’, used in the sections upon which the indictment was founded, means no

^{*} At 290 U. S. 392 this court—italicizing the crucial word—quotes the statute under which *Murdock* was prosecuted:

“‘Any person required under this Act to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this Act; who *wilfully* fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.’ ”

^{**} *Murdock*’s refusal was upon the advice of counsel and upon the ground that the answers would tend to incriminate, “having particularly in mind a State law” (*Murdock* record on appeal to this Court, p. 37).

more than voluntarily." And in a criminal statute, the word does mean "more than 'voluntarily'" (394-5):

"The word often denotes an act which is intentional or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose;¹ without justifiable excuse;² stubbornly, obstinately, perversely.³ The word is also employed to characterize a thing done without ground for believing it is lawful,⁴ or conduct marked by careless disregard whether or not one has the right so to act.⁵"

The error of the trial judge in *Murdock's* case was the same error into which Judge Coxe fell in the case at bar. "You will observe," the judge told the *Murdock* jury (*Murdock* rec. 48),

"that the offense charged here is the willful failure or refusal to furnish information. That means, gentlemen of the jury, that having an opportunity to do so he *deliberately* designed not to furnish the information."

"The words 'wilfully and knowingly' as employed in the statute," Judge Coxe instructed the Browder jury (R. 292-293),

"mean *deliberately* and with knowledge and not some thing which is merely careless or negligent or inadvertent."

¹ Citing *Felton v. United States*, 96 U. S. 699; *Potter v. United States*, 155 U. S. 438; *Spurr v. United States*, 174 U. S. 728.

² Citing *Felton v. United States*, *supra*; *Williams v. People*, 26 Colo. 272, 57 Pac. 701; *People v. Jewell*, 138 Mich. 620, 101 N. W. 835; *St. Louis I. M. & S. R. Co. v. Batesville & W. Tel. Co.*, 80 Ark. 499, 97 S. W. 660; *Clay v. State*, 52 Tex. Crim. Rep. 555, 107 S. W. 1129.

³ Citing *Wales v. Miner*, 89 Ind. 118, 127; *Lynch v. Com.*, 131 Va. 762, 109 S. E. 427; *Claus v. Chicago G. W. R. Co.*, 136 Iowa 7, 111 N. W. 15; *State v. Harwell*, 129 N. C. 550, 40 S. E. 48.

⁴ Citing *Roby v. Newton*, 121 Ga. 679, 49 S. E. 694, 68 L. R. A. 601.

⁵ Citing *United States v. Philadelphia & R. R. Co.* (D. C.), 223 Fed. 207, 210; *State v. Savre*, 129 Iowa 122, 105 N. W. 387, 3 L. R. A. (N. S.) 455, 113 Am. St. Rep. 452; *State v. Morgan*, 136 N. C. 628, 48 S. E. 670.

These two definitions of "wilfully" would have done well enough for "knowingly." * "Wilfulness," however, "has been defined to mean something more than knowingly" (*Murdock v. United States*, 62 F. (2d) 926, 928 (C. C. A. 7), citing *Felton v. United States*, 96 U. S. at 703; *Spurr v. United States*, 174 U. S. 734). And the court which noted that such a definition had been twice given by this Court, and which applied that definition, was itself affirmed by this Court (*United States v. Murdock*). **

That "wilfully" by itself means something other—and more—than "knowingly" is thus settled by the *Murdock* case and many others. The statute at bar—like the statute involved in *St. Louis & S. F. R. Co. v. United States*, 169 Fed. 69 (C. C. A. 8, Van Devanter, Cir. J.)—couples the terms. Particularly in such a case (*St. Louis & S. F. R. Co. v. United States*, *supra*, at 71, quoted in *United States v. Illinois Central R. Co.*, 303 U. S. 239, 243):

" 'Wilfully' means something not expressed by 'knowingly,' else both would not be used conjunctively."

The court below does not defend the trial court's treatment of "wilfulness". Judge Patterson's sole point is that "the appellant took no exception to the definition [of wil-

* *Yates v. Jones National Bank*, 206 U. S. 158, 180, says of "knowingly":

"Where by law a responsibility is made to arise from the violation of a statute knowingly, proof of something more than negligence is required, that is that the violation must in effect be intentional."

** " 'Wilfully' is a word of stronger meaning than either 'knowingly' or 'corruptly,' or than 'both' together" (*Williams v. People*, 26 Colo. 272, cited in *United States v. Murdock*, 290 U. S. 389, 394).

"The word 'wilfully,'" says Chief Justice Shaw, "in the ordinary sense in which it is used in statutes, means not merely 'voluntarily,' but with a bad purpose" (*Felton v. United States*, 96 U. S. 699, 702; citing *Com. v. Kneeland*, 20 Pick. 220).

Wilfulness requires more than that conduct be "intentional and without legal justification" (*United States v. Murdock*, 290 U. S. at 397).

fulness] and did not ask that a more particular exposition be given" (R. 403). But in the *Murdock* case too there was no exception to that part of the trial judge's charge which disclosed his belief that wilfulness and knowledge were synonyms (*Murdock*, R. 48 *et seq.*). The absence of exception did not save the verdict in the *Murdock* case and should not in the case at bar. For in the *Murdock* case there was, and in the case at bar there is, another ruling predicated upon the same erroneous view of the wilfulness issue; and in each case exception was taken to that other ruling:

In the circumstances of the *Murdock* case there was error in the court's expressing to the jury his personal opinion that the prosecution's case had been proved,* and there was exception predicated upon that error.

In the case at bar there was the inclusive error of denying defendant's motion to dismiss at the close of the case "on the ground that there was no criminal intent," "that the Government has failed to prove that the defendant wilfully and knowingly used the passport to gain and secure entry into the United States," that "the Government has failed to prove that the defendant had a criminal intent at the time that he presented the passport to the immigration inspector in 1937 and 1938" (R. 227-8; exception 236; Eighteenth assignment of error, R. 386).

" 'Wilful' wrong is of the essence of the accusation" (*Potter v. United States*, 155 U. S. 438, 448), "the gravamen of the offense" (*Evans v. United States*, 153 U. S. 584, 594, quoted in *Potter v. United States*, 155 U. S. at 446, and *Spurr v. United States*, 174 U. S. 728, at 735). Where the

* That "such an expression of opinion" does not

"warrant a reversal where upon the undisputed and admitted facts the defendant's voluntary conduct amounted to the commission of the crime defined by the statute"

was recognized in the *Murdock* opinion (290 U. S. at 394; citing *Horning v. District of Columbia*, 254 U. S. 135).

statute calls for wilfulness, and there is no evidence of wilfulness; the case must, upon motion of the defendant, be dismissed at the close of the evidence, or verdict for the defendant directed (*St. Louis & S. F. R. Co. v. United States*, 169 Fed. 69 [C. C. A. 8], Van Devanter, Cir. J., Sanborn, Cir. J., concurring; to the same effect *United States v. Lehigh Valley R. Co.*, 204 Fed. 705, 707 [C. C. A. 3]).*

* Other rulings, to which exceptions were taken, raised the wilfulness issue:

- (1) Defendant requested the court to charge

"If you should find that the sentence in the application for a passport, executed by the defendant on or about August 31, 1934, which reads as follows:

'My last passport was obtained from

..... on
(INSERT WASHINGTON OR LOCATION OF OFFICE ABROAD) (DATE)
and is submitted herewith for cancellation.

.....
(GIVE DISPOSITION OF PASSPORT IF IT CANNOT BE LOCATED)'

was interpreted by the defendant to mean that he did not have any passport in his possession to be submitted for cancellation, and that it was not his intention to conceal from the Government the fact that he previously had obtained another passport, then it is your duty to find the defendant not guilty" (26th request to charge, R. 284; refusal and exception included in Thirty-first assignment, R. 300, 390).⁶

- (2) Defendant requested the court to charge

"If you find that the presentation of the passport on those two occasions was only for the purpose of identifying himself as a citizen of the United States, and not for the purpose of gaining a privilege as is intended by the inherent nature of a passport when used in foreign countries, then you must acquit the defendant. In determining the inherent nature of a passport, you must bear in mind that a passport has no sanctioned use, in law or custom, insofar as an American citizen is concerned, within the Port of New York" (33d request to charge, R. 286; refusal and exception included in Thirty-first assignment, R. 300, 392).

The 35th and 36th requests are along somewhat the same line (R. 286-7); the refusals and exceptions are included in the Thirty-first assignment (R. 300, 392):

The court was asked—but refused to charge—that an immigration inspector "has no power to exclude an American citizen for any reason whatsoever." "He must, as a matter of law, permit him to enter the country, when satisfied that he is an American citizen."

Conclusion.

The statute to be construed involves "foreign relations and intercourse." The ruling as to "use" is without precedent. The ruling as to "wilfulness" defies precedent. This Court should review, we submit, the judgment that rests upon these rulings in combination.

The Court in the exercise of its supervisory powers should grant a writ of certiorari to review and reverse the decision of the Circuit Court of Appeals for the Second Circuit.

WALTER H. POLLAK,
Attorney for Petitioner.

WALTER H. POLLAK,
CAROL KING,
BENJAMIN GOLDRING,
Of Counsel.

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JUL 29 1940

CHARLES ELMOORE CROPLEY
CLERK

No. 287

Supreme Court of the United States

OCTOBER TERM, 1940

EARL RUSSELL BROWDER

Petitioner

against

UNITED STATES OF AMERICA

**APPENDIX AND SUPPLEMENT TO BRIEF
FOR PETITIONER**

I

APPENDIX

CONGRESS

page

Act of March 2, 1907, § 1	1
Act of June 15, 1917, title IX; 22 U. S. C. A. §§ 213, 220-222	2
Act of May 22, 1918; 22 U. S. C. A. §§ 223-226	5
Act of November 10, 1919	8
Act of June 4, 1920	11
Act of March 2, 1921; 22 U. S. C. A. § 227	13
Act of July 3, 1926; 22 U. S. C. A. §§ 211a, 214a	14
Act of May 16, 1932; 22 U. S. C. A. § 217a	16

PRESIDENT

Rules governing the granting and issuing of passports in the United States, issued January 24, 1917	17
issued March 31, 1938	18

DEPARTMENT OF STATE

Circular instruction of November 18, 1911	19
Rules governing the granting and issuing of pass- ports to those who have declared their intention to become citizens of the United States, issued June 1, 1915	20
Circular instruction of March 26, 1923	21
Press release, and passport regulations of Sept. 4, 1939	23

II

SUPPLEMENT

Supplement	27
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APPENDIX TO BRIEF FOR PETITIONER.

I. CONGRESS

[PUBLIC—No. 193—59TH CONGRESS]

AN ACT In reference to the expatriation of citizens
and their protection abroad.

[Act of March 2, 1907 (34 Stat. L., 1228).]

SECTION 1. That the Secretary of State shall be authorized, in his discretion, to issue passports to persons not citizens of the United States as follows: Where any person has made a declaration of intention to become such a citizen as provided by law and has resided in the United States for three years a passport may be issued to him entitling him to the protection of the Government in any foreign country: *Provided*, That such passport shall not be valid for more than six months and shall not be renewed, and that such passport shall not entitle the holder to the protection of this Government in the country of which he was a citizen prior to making such declaration of intention.

* * * * *

[Repealed by §5 of the Act of June 4, 1920, *post.*]

[PUBLIC—No. 24—65TH CONGRESS.]

[Extract.]

[H. R. 291.]

AN ACT To punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes.

TITLE IX

PASSPORTS

Application requirements.

SECTION 1. Before a passport is issued to any person by or under authority of the United States such person shall subscribe to and submit a written application duly verified by his oath before a person authorized and empowered to administer oaths, which said application shall contain a true recital of each and every matter of fact which may be required by law or by any rules authorized by law to be stated as a prerequisite to the issuance of any such passport. Clerks of United States courts, agents of the Department of State, or other Federal officials authorized, or who may be authorized, to take passport applications and administer oaths thereon, shall collect, for all services in connection therewith, a fee of \$1, and no more, in lieu of all fees prescribed by any statute of the United States, whether the application is executed singly, in duplicate, or in triplicate.

Fee limited.

SEC. 2. Whoever shall willfully and knowingly make any false statement in an application for passport with intent to induce or secure the issuance of a passport under the authority of the United States, either for his own use or the use of another, contrary to the laws regulating the issuance of passports or the rules prescribed pursuant to such laws, or whoever shall willfully and knowingly use or attempt to use, or furnish to another for use, any passport the issue of which was secured in any way by reason of any false statement, shall be fined not more than \$2,000 or imprisoned not more than five years or both.

Punishment for false statements in applications.

Using, passports so obtained.

SEC. 3. Whoever shall willfully and knowingly use, or attempt to use, any passport issued or designed for the use of another than himself, or whoever shall willfully and knowingly use or attempt to use any passport in violation of the conditions or restrictions therein contained, or of the rules prescribed pursuant to the laws regulating the issuance of passports, which said rules shall be printed on the passport; or whoever shall willfully and knowingly furnish, dispose of, or deliver a passport to any person, for use by another than the person for whose use it was originally issued and designed, shall be fined not more than \$2,000 or imprisoned not more than five years, or both.

Illegally using passport of another.

Violating restrictions.

Delivery to unauthorized person.

SEC. 4. Whoever shall falsely make, forge, counterfeit, mutilate, or alter, or cause or procure to be falsely made,

Punishment for counterfeiting, forging, etc., passports.

Using forged,
etc., passports.

.Void passports.

forged, counterfeited, mutilated, or altered any passport or instrument purporting to be a passport, with intent to use the same, or with intent that the same may be used by another; or whoever shall willfully or knowingly use, or attempt to use, or furnish to another for use any such false, forged, counterfeited, mutilated, or altered passport or instrument purporting to be a passport, or any passport validly issued which has become void by the occurrence of any condition therein prescribed invalidating the same, shall be fined not more than \$2,000 or imprisoned not more than five years, or both.

Approved, June 15, 1917.

[22 U. S. C. A. §§213, 220-222. Title 22 of the U. S. C. A. is entitled: Foreign Relations and Intercourse.]

[PUBLIC—No. 154—65TH CONGRESS.]

[H. R. 10264.]

AN ACT To prevent in time of war departure from or entry into the United States contrary to the public safety.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That when the United States is at war, if the President shall find that the public safety requires that restrictions and prohibitions in addition to those provided otherwise than by this Act be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or Congress, be unlawful—

Foreign travel.

Acts of, made unlawful during time of war.

(a) For any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President shall prescribe;

Aliens violating prescribed rules.

(b) for any person to transport or attempt to transport from or into the United States another person with knowledge or reasonable cause to believe that the departure or entry of such other person is forbidden by this act;

Transporting prohibited persons.

(c) For any person knowingly to make any false statement in an application for permission to depart from or enter the

Making false application for permits.

United States with intent to induce or secure the granting of such permission either for himself or for another;

Furnishing false permits, etc.

(d) For any person knowingly to furnish or attempt to furnish or assist in furnishing to another a permit or evidence of permission to depart or enter not issued and designed for such other person's use;

Using permit of another person.

(e) For any person knowingly to use or attempt to use any permit or evidence of permission to depart or enter not issued and designed for his use;

Forging, etc., permits.

(f) For any person to forge, counterfeit, mutilate, or alter, or cause or procure to be forged, counterfeited, mutilated, or altered, any permit or evidence of permission to depart from or enter the United States;

Using false, etc., permits.

(g) For any person knowingly to use or attempt to use or furnish to another for use any false, forged, counterfeited, mutilated, or altered permit, or evidence of permission, or any permit or evidence of permission which, though originally valid, has become or been made void or invalid.

Passports required for all entries and departures of citizens.

SEC. 2. That after such proclamation as is provided for by the preceding section has been made and published and while said proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize

and prescribe, be unlawful for any citizen of the United States to depart from or enter or attempt to depart from or enter the United States unless he bears a valid passport.

SEC. 3. That any person who shall willfully violate any of the provisions of this Act, or of any order or proclamation of the President promulgated, or of any permit, rule, or regulation issued thereunder, shall, upon conviction, be fined not more than \$10,000, or, if a natural person, imprisoned for not more than twenty years, or both; and the officer, director, or agent of any corporation who knowingly participates in such violation shall be punished by like fine or imprisonment, or both; and any vehicle or any vessel, together with its or her appurtenances, equipment, tackle, apparel, and furniture, concerned in any such violation, shall be forfeited to the United States.

Punishment
for violation.

Forfeiture
of vehicle,
vessel, etc.

SEC. 4. That the term "United States" as used in this Act includes the Canal Zone and all territory and waters, continental or insular, subject to the jurisdiction of the United States.

Meaning
of terms:

"United
States."

The word "person" as used herein shall be deemed to mean any individual, partnership, association, company, or other unincorporated body of individuals, or corporation, or body politic.

"Person."

Approved, May 22, 1918.

[PUBLIC—No. 79—66TH CONGRESS.]

[H. R. 9782.]

AN ACT To regulate further the entry of aliens into the United States.

Entry of aliens.

Restrictions imposed on.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That if the President shall find that the public safety requires that restrictions and prohibitions in addition to those provided otherwise than by this Act be imposed upon the entry of aliens into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or Congress, be unlawful—

Aliens violating prescribed rules.

(a) For any alien to enter or attempt to enter the United States except under such reasonable rules, regulations, and orders, and subject to such passport, visé, or other limitations and exceptions as the President shall prescribe;

Transporting prohibited persons.

(b) For any person to transport or attempt to transport into the United States another person with knowledge or reasonable cause to believe that the entry of such other person is forbidden by this Act;

Making false applications for passports, etc.

(c) For any person knowingly to make any false statement in an application for a passport or other permission to enter the United States with intent to induce or secure the granting of such permission, either for himself or for another;

(d) For any person knowingly to furnish or attempt to furnish or assist in furnishing to another a viséed passport or other permit or evidence of permission to enter, not issued and designed for such other person's use;

Furnishing
viséed passport
of another
person.

(e) For any person knowingly to use or attempt to use any viséed passport or other permit or evidence of permission to enter not issued and designed for his use;

Using viséed
passport of
another.

(f) For any person to forge, counterfeit, mutilate, or alter, or cause or procure to be forged, counterfeited, mutilated, or altered, any passport, visé or other permit or evidence of permission to enter the United States;

Forging, etc.,
passports.

(g) For any person knowingly to use or attempt to use or furnish to another for use any false, forged, counterfeited, mutilated, or altered passport, permit, or evidence of permission, or any passport, permit, or evidence of permission which, though originally valid, has become or been made void or invalid.

Using false,
etc., passports.

SEC. 2. That any person who shall willfully violate any of the provisions of this Act, or of any order or proclamation of the President promulgated, or of any permit, rule, or regulation issued thereunder, shall, upon conviction, be fined not more than \$5,000, or, if a natural person, imprisoned for not more than five years, or

Punishment
for violations.

Corporation
official
participating
therein.

Forfeiture
of vehicle,
vessel, etc.

Effective on
termination of
previous act.

Duration.

both; and the officer, director, or agent of any corporation who knowingly participates in such violation shall be punished by like fine or imprisonment, or both; and any vehicle or any vessel, together with its or her appurtenances, equipment, tackle, apparel, and furniture, concerned in any such violation, shall be forfeited to the United States.

* * * * *

SEC. 5. That this Act shall take effect upon the date when the provisions of the Act of Congress approved the 22d day of May, 1918, entitled "An Act to prevent in time of war departure from and entry into the United States, contrary to the public safety," shall cease to be operative, and shall continue in force and effect until and including the 4th day of March, 1921.

Received by the President, October 29, 1919.

[NOTE BY THE DEPARTMENT OF STATE.—The foregoing act having been presented to the President of the United States for his approval, and not having been returned by him to the house of Congress in which it originated within the time prescribed by the Constitution of the United States, has become a law without his approval.]

[This Act never became operative]

[PUBLIC—No. 238—66TH CONGRESS.]

[Extract.]

[H. R. 11960.]

AN ACT Making appropriations for the
Diplomatic and Consular Service for
the fiscal year ending June 30, 1921.

FEES FOR PASSPORTS AND VISÉS.

SECTION 1. From and after the 1st day of July, 1920, there shall be collected and paid into the Treasury of the United States quarterly a fee of \$1 for executing each application for a passport and \$9 for each passport issued to a citizen or person owing allegiance to or entitled to the protection of the United States: *Provided*, That nothing herein contained shall be construed to limit the right of the Secretary of State by regulation to authorize the retention by State officials of the fee of \$1 for executing an application for a passport: * * *

Fees established
for application
and issue of.

Provisos.

Retention of fee
by State officials.

SEC. 3. The validity of a passport or visé shall be limited to two years, unless the Secretary of State shall by regulation limit the validity of such passport or visé to a shorter period.

Validity limited.

SEC. 4. Whenever the appropriate officer within the United States of any foreign country refuses to visé a passport issued by the United States, the Department of State is hereby authorized upon request

Return of
passport fee if
visé refused by
foreign officer.

in writing and the return of the unused passport within six months from the date of issue to refund to the person to whom the passport was issued the fees which have been paid to Federal officials, and the money for that purpose is hereby appropriated and directed to be paid upon the order of the Secretary of State.

Authority to
issue passports
to persons not
citizens repealed.
Vol. 34, p. 1228,
repealed.

SEC. 5. Section 1 of the Act approved March 2, 1907, entitled "An Act in reference to the expatriation of citizens and their protection abroad" (Thirty-fourth Statutes at Large, part 1, page 1228), authorizing the Secretary of State to issue passports to certain persons not citizens of the United States is hereby repealed.

Approved, June 4, 1920.

[Sec. 3 of this Act was repealed by §4 of
Act of July 3, 1926. *post*]

[PUBLIC—No. 357—66TH CONGRESS]

[Extract.]

[H. R. 15872.]

AN ACT Making appropriations for the Diplomatic and Consular Service for the fiscal year ending June 30, 1922.

EXPENSES, PASSPORT CONTROL ACT.

For expenses of regulating entry into the United States, in accordance with the provisions of the Act approved May 22, 1918, and of this Act, to be immediately available, \$600,000: *Provided*, That the provisions of the Act approved May 22, 1918, shall, in so far as they relate to requiring passports and visés from aliens seeking to come to the United States, continue in force and effect until otherwise provided by law.

Approved, March 2, 1921.

[22 U. S. C. A. §227]

[PUBLIC—No. 493—69TH CONGRESS]

[H. R. 12495]

AN ACT To regulate the issue and validity of passports, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States, and by such consul generals, consuls, or vice consuls when in charge, as the Secretary of State may designate, and by the chief or other executive officer of the insular possessions of the United States, under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports.

SEC. 2. That the validity of a passport or visa shall be limited to a period of two years: *Provided*, That the Secretary of State may limit the validity of a passport or visa to a shorter period and that no immigration visa shall be issued for a longer period than that specified in the Immigration Act of 1924 or amendments thereto: *And provided further*, That a passport may be renewed without any additional charge under regulations prescribed by the Secretary of State, and at his discretion to bona fide teachers, but the final date of expiration shall not be more than four years from the original date of issue.

SEC. 3. That whenever a fee is erroneously charged and paid for the issue of a passport to a person who is exempted from the payment of such a fee by section 1 of "An Act making appropriations for the Diplomatic and Consular Service for the fiscal year ending June 30, 1921," approved June 4, 1920 (Forty-first Statutes, page 750), the

Department of State is hereby authorized to refund to the person who paid such fee the amount thereof, and the money for that purpose is hereby authorized to be appropriated.

SEC. 4. That section 4075 of the Revised Statutes of the United States as amended by the Act of June 14, 1902 (Thirty-second Statutes, page 386), and section 3 of "An Act making appropriations for the Diplomatic and Consular Service for the fiscal year ending June 30, 1921," approved June 4, 1920 (Forty-first Statutes, page 750), except as hereinbefore provided are hereby repealed.

Approved, July 3, 1926.

[22 U. S. C. A. §§211a, 214a.]

[PUBLIC—No. 136—72D CONGRESS]

[H. R. 9393]

AN ACT To increase passport fees, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2 of the Act entitled "An Act to regulate the issue and validity of passports, and for other purposes," approved July 3, 1926, as amended by the Act entitled "An Act to provide for the renewal of passports," approved July 1, 1930, is amended to read as follows:

"SEC. 2. That the validity of a passport or passport visa shall be limited to a period of two years, *Provided*, That a passport may be renewed under regulations prescribed by the Secretary of State for a period, not to exceed two years, upon payment of a fee of \$5 for such renewal, but the final date of expiration shall not be more than four years from the original date of issue: *Provided further*, That the Secretary of State may limit the validity of a passport, passport visa, or the period of renewal of a passport to less than two years: *Provided further*, That the charge for the issue of an original passport shall be \$9."

Approved, May 16, 1932.

[22 U. S. C. A. §217a]

II. PRESIDENT.

Rules Governing the Granting and Issuing of Passports in the United States

ISSUED JANUARY 24, 1917

• • • • •

Passports issued by the Department of State or its diplomatic or consular representatives are intended for identification and protection in foreign countries, and not to facilitate entry into the United States, immigration being under the supervision of the Department of Labor.*

• • • • •

WOODROW WILSON.

THE WHITE HOUSE,
24 January, 1917.

*This provision is likewise contained in the Presidential rules of:

June 7, 1911, rule 4, par. 3;
Nov. 13, 1914, rule 4, par. 3;
Jan. 12, 1915, rule 5, par. 3;
Dec. 17, 1915, rule 6, par. 2;
Apr. 17, 1916, rule 6, par. 2.

*Rules Governing the Granting and Issuing of Passports
in the United States*

ISSUED MARCH 31, 1938

124. The Secretary of State is authorized in his discretion to refuse to issue a passport, to restrict a passport for use only in certain countries, to restrict it against use in certain countries, to withdraw or cancel a passport already issued, and to withdraw a passport for the purpose of restricting its validity or use in certain countries.

125. Should a person to whom a passport has been issued knowingly use or attempt to use it in violation of the conditions or restrictions contained therein or of the provisions of these rules, the protection of the United States may be withdrawn from him while he continues to reside abroad.

FRANKLIN D. ROOSEVELT

THE WHITE HOUSE,
March 31, 1938.

[3 F. R. 681]

III. DEPARTMENT OF STATE

[No. 77. General instruction. Consular]

EXPATRIATION

RULE (D) UNDER WHICH THE PRESUMPTION ARISING UNDER SECTION 2 OF THE ACT OF MARCH 2, 1907, MAY BE OVERCOME

The Secretary of State to the American diplomatic and consular officers (including consular agents)

DEPARTMENT OF STATE,
Washington, November 18, 1911.

Gentlemen: In view of the decision of the Attorney General communicated to you in the circular instruction of December 22, 1910, entitled "Expatriation," the following rule (d) is adopted as supplementary to rules (a), (b), and (c) prescribed in circular instruction of April 19, 1907, whereunder the presumption of expatriation arising against a naturalized citizen under the provision of the second paragraph of section 2 of the act of March 2, 1907, may be overcome, namely, by his presenting to a diplomatic or consular officer proof establishing the following fact:

(d) That he has made definite arrangements to return immediately to the United States for permanent residence.

Under the circumstances mentioned a passport may be issued to the person concerned by a diplomatic officer or consular officer authorized to issue emergency passports, if he needs it to enable him to leave the country in which he has been residing or to pass on his way to the United States through a country in which passports are required. A passport should not be issued merely to facilitate entry into the United States.

I am, etc.,

P. C. KNOX.

*Rules of June 1, 1915, governing the granting and issuing
of passports to those who have declared their intention
to become citizens of the United States*

1. The first section of the act approved March 2, 1907, "in reference to the expatriation of citizens and their protection abroad," provides "That the Secretary of State shall be authorized, in his discretion, to issue passports to persons not citizens of the United States as follows: Where any person has made a declaration of intention to become such a citizen as provided by law and has resided in the United States for three years, a passport may be issued to him entitling him to the protection of this Government in any foreign country: *Provided*, That such passport shall not be valid for more than six months and shall not be renewed, and that such passport shall not entitle the holder to the protection of this Government in the country of which he was a citizen prior to making such declaration of intention."*

A passport may be granted to a declarant under the statutory provision quoted above for purposes of identification, and protection in foreign countries, other than his country of origin, but not for the purpose of facilitating reentry into this country. All matters relating to immigration being under the supervision of the Department of Labor, any inquiries concerning the right to reenter the United States should be addressed to that Department.

W. J. BRYAN.

DEPARTMENT OF STATE,
Washington, June 1, 1915.

[For. Rels., 1915 Supp., pp. 906-8]

*[Repealed by § 5 of Act of June 4, 1920, *supra*.]

[No. 885. General instruction. Consular. (Diplomatic
Serial No. 187)]

CANCELLATION OF EXPIRED AMERICAN PASSPORTS

DEPARTMENT OF STATE,
Washington, March 26, 1923.

To the American Diplomatic and Consular Officers.

Gentlemen: The second page of American passports bears the following notice:

This passport is valid for a period of twelve months and expires _____ unless previously extended. It is subject to one or more extensions, provided the final date of expiration is not later than two years after the date of its issuance.

Section 4, Title IX of the espionage act states that—

* * * whoever shall "willfully or knowingly use or attempt to use * * * any passport validly issued which has become void by the occurrence of any condition therein prescribed invalidating the same shall be fined not more than \$2,000 or imprisoned not more than five years, or both.

It is known that many naturalized American citizens, especially those of European origin, continue to use American passports long after the expiration of their maximum period of validity. A still more serious offense is the continued use of passports which have been specifically limited as to validity. For example, the department occasionally limits a passport because of conditions peculiar to the case, or on the sworn statement of the applicant that he will return to the United States within the designated period. In cases of that class, the department intends that the pro-

tection of this Government should not be extended to holders of the passports after the determination of the validity, unless such validity is extended by the department to some future date.

I am, gentlemen,

Your obedient servant,

For Secretary of State:

ALVEY A. ADE

[Compilation, pp. 113-114]

*Press release, and departmental passport regulations
promulgated after outbreak of European War of
1939.*

In view of the exigencies of the present situation in Europe, particularly the danger of travel to and from Europe, the hazards which may be encountered in residing in belligerent countries, and the shortage of steamship facilities to transport the many thousands of American citizens now in Europe who have been urged to return to the United States, the Secretary of State has deemed it advisable to prescribe regulations under which no passport which has heretofore been issued shall be valid for use in traveling from the United States to any country in Europe unless it is submitted to the Department for validation for such use. Under the new regulations, before the Department of State will validate any passport heretofore issued or issue any new passports for use in Europe, it will be required that documentary evidence be submitted to it showing the imperative necessity for traveling to Europe. It is contemplated by the new regulations to restrict the use of passports only to those who can show an imperative necessity for traveling in Europe and at the same time to take every possible precaution to assure the importance of American passports as definitely identifying and establishing the citizenship of the person to whom they are issued. Extraordinary care will thus be taken in this regard and consequently persons desiring to have passports already issued to them validated for future use in Europe and persons desiring to obtain new passports for use therein are urged to submit their applications at least three weeks in advance of their expected sailing.

In order to assure strict compliance with the new regulations, passports of American citizens intending to depart for Europe will be carefully examined to see that they have been validated for use in Europe. Upon the return of American citizens their passports will be taken up and returned to the Department of State for safe keeping and to assure that they will not again be used except in accordance with the new regulations.

The Passport Agencies in New York, Boston, Chicago and San Francisco are being advised of the new regulations and for the convenience of the officers in the various foreign consulates situated in the cities mentioned they are being instructed to furnish each such officer with a copy of the new regulations requiring the validation by the Department of passports heretofore issued in order that they may hereafter be used in traveling to Europe. The new regulations are as follows:

DEPARTMENTAL ORDER

No. 811

By virtue of and pursuant to the authority vested in me by Section I of the Act of July 3, 1926, 44 Stat. 887 (U. S. C., Title 22, Section 211a), and by Executive Order No. 7856 of March 31, 1938, prescribing rules governing the granting and issuing of passports in the United States, I, the undersigned, Secretary of State of the United States, hereby prescribe the following regulations:

No passport heretofore issued shall be valid for use in traveling from the United States to any country in Europe unless it is submitted to the Department of State for validation.

Before the Department of State will validate any passport heretofore issued for use in any country in Europe, it will be necessary for the person to whom the passport was issued to submit documentary evidence concerning the imperativeness of his proposed travel. A person who desires travel in Europe for commercial purposes must support his application for the validation of his passport or for the issue of a passport with a letter from the head of the firm in the interests of which he intends to go to Europe. Such letter must state not only the names of the European countries which the applicant expects to visit and the objects of his visits thereto, but in addition, whether or not the applicant is a salaried employee of the firm concerned; and if so, how long he has been known to the

firm and for what period of time he has been in its employ. If the applicant is going to Europe on a commission and not a salary basis, that fact also should be specifically stated. If the applicant for a passport is himself the head of the concern for which he is going to Europe, he must submit a letter from another officer of the concern or a letter from the head of some other reputable concern who has had business transactions with the applicant and has knowledge of the business in which the applicant is engaged and the object and necessity of his proposed trip to Europe.

An applicant who is going to Europe for any purpose other than commercial business must satisfy the Department of State that it is imperative that he go, and he must submit satisfactory documentary evidence substantiating his statement concerning the imperativeness of his proposed trip.

In view of the exigencies of the present situation and the consequent necessity of exercising the greatest care in the validation of passports or the issue of new passports, the Department of State will be obliged to hold applicants and firms responsible for any false or misleading statements made by them in connection with applications for passports, and any such false or misleading statements would be in violation of Section 220 of Title 22 of the U. S. Code, which reads as follows:

"Whoever shall willfully and knowingly make any false statement in an application for passport with intent to induce or secure the issuance of a passport under the authority of the United States, either for his own use or the use of another, contrary to the laws regulating the issuance of passports or the rules prescribed pursuant to such laws, or whoever shall willfully and knowingly use or attempt to use, or furnish to another for use, any passport the issue of which was secured in any way by reason of any false statement, shall be fined not more than \$2,000 or imprisoned not more than five years or both."

Women and children will not be included in passports issued to their husbands or fathers unless the urgent and imperative necessity of accompanying them is conclusively established.

Passports will not, as a rule, be validated or issued for travel in opposing belligerent countries.

Should a person now having a valid passport proceed to any European country without first having submitted his passport to the Department of State for validation, the protection of the United States may be withheld from him while he is abroad.

Should a person to whom a passport has been issued use it in violation of the conditions or restrictions contained therein, the protection of the United States may likewise be withheld from him while he is abroad and he will be liable for prosecution under the provisions of Section 221 of Title 22 of the U. S. Code, which reads in part as follows:

“ * * * whoever shall willfully and knowingly use or attempt to use any passport in violation of the conditions or restrictions therein contained, or of the rules prescribed pursuant to the laws regulating the issuance of passports, which said rules shall be printed on the passport; * * * shall be fined not more than \$2,000 or imprisoned not more than five years, or both.”

Hereafter when a passport is validated for or issued for use in Europe, its validity shall be restricted to the period necessary to accomplish the purpose of the intended visit to Europe but in no case beyond a period of six months.

Passports in possession of persons now residing abroad shall in due course be submitted to American consular officers for appropriate endorsement under special instructions to be sent to such officers at a later date.

CORDELL HULL

DEPARTMENT OF STATE,
September 4, 1939.

Supplement

PASSPORT CONTROL 1914-1917

Administrative control before enactment of Title IX

The State Department very shortly after the outbreak of the World War required a passport applicant to state the names of the countries he wished to visit and the objects of his visit. The countries and objects were stamped upon the passport together with the statement that the holder had declared under oath that he desired it for use in those countries and for those objects. The passport contained the provision that it was not valid for use in other countries except for necessary transit to or from the countries named.* The valid life of the passport was reduced to six months.**

The administration early adopted the practice of refusing passports to those who wanted to visit the belligerent countries out of mere curiosity or the like.*** Passport rules promulgated by the President December 17, 1915**** were designed to reduce outgoing travel to the minimum.

*See as to these matters Presidential passport rules of Nov. 13, 1914 and succeeding passport rules, in *Compilation*, pp. 198 et seq.; circular instruction, Secretary of State to American diplomatic and consular officers, Dec. 21, 1914, and Feb. 8, 1915. *For. Rels.*, 1914 Supp., p. 728, 1915 Supp., p. 900, *Compilation*, pp. 43, 48; Notice to American citizens who contemplate visiting belligerent countries, Dept. of State, April 17, 1915, *European War*, no. 2, pt. XIX, p. 162; letter from Counselor of the Department of State, Frank L. Polk, to Rep. John J. Fitzgerald, Aug. 18, 1916, *For. Rels.*, 1916 Supp., at p. 8.

**Presidential passport rules of Jan. 12, 1915, rule 11, exec. order 2119A, *For. Rels.*, 1915 Supp., p. 903, *Compilation*, p. 201; circular instruction of Feb. 8, 1915, *For. Rels.*, 1915 Supp., p. 900, *Compilation*, p. 48.

***See Notice to American citizens who contemplate visiting belligerent countries, Dept. of State, Apr. 17, 1915, *supra*.

****Exec. order 2286A, *For. Rels.*, 1915 Supp., p. 912, *Compilation*, p. 202.

An applicant who asserted that he was going abroad for commercial business was required to give proof of this.* Any other applicant was required to satisfy the State Department that it was imperative for him to go, and submit documentary substantiation.**

The President at the same time—mid-December 1915—established a system of supervision over departing travelers:***

A passport bore a stamped notation of the date at which, the port from which, and the ship on which, the holder intended to leave the United States. Treasury inspectors—the “neutrality squad” (N. Y. Times, Jan. 23, 1916, mag. sec. p. 12, col. 2)—stationed at outgoing ships examined the passports of all passengers going abroad. These inspectors had each passenger’s photograph, signature and duplicate passport application. If with these identifying

*The requirement of the submission of proof substantiating a claim of commercial business abroad was made more stringent in the Presidential passport rules of Jan. 24, 1917 (exec. order 2519A, For. Rels., 1917 Supp. I, p. 573, Compilation, p. 209).

**See also rules governing the granting and issuing of passports to those who have declared their intention to become citizens of the United States, June 1, 1915, For. Rels., 1915 Supp., p. 906, European War, no. 2, pt. XIX, p. 164.

***December 15, 1915 the President promulgated executive order 2285 (For. Rels., 1915 Supp., p. 911; N. Y. Times, Dec. 16, 1915, p. 7, col. 5):

“All persons leaving the United States for foreign countries should be provided with passports of the Governments of which they are citizens. . . . The Secretary of State, in cooperation with the Secretary of the Treasury, will make arrangements for the inspection of passports of all persons, American or foreign, leaving this country, and the fact that these passports have been seen will be stamped thereon.

All applications to the Secretary of State for passports from American citizens must be made in duplicate, and must be accompanied with three copies of the photograph of the applicant. Each applicant for a passport must inform the Department of State at what point he intends to depart, on what date, and by what ship if he sails from an American port.”

data the inspectors were satisfied with the passport, they so stamped it before the vessel's departure.*

ENACTMENT OF TITLE IX

June 3, 1916 the Attorney-General addressed communications to the foreign relations committees and judiciary committees of the House and Senate presenting drafts of a number of neutrality bills and the arguments for them,—including one dealing with passports.** In August 1916 the legislation was introduced in the Senate by the Chairman of Judiciary, in the House by the Chairman of Foreign Affairs. But the bills did not pass the first session of the 64th Congress.*** In his annual report published December 1916 the Attorney-General renewed his recommendations with respect to neutrality legislation, including passport legislation. In the second session of the 64th Congress the Senate passed such a bill; the House took no action.****

*For other material on the control system, see letter of Secretary of State to foreign diplomatic representatives stationed in the U. S., Dec. 23, 1915, For. Rels., 1915 Supp., p. 913; N. Y. Times, Dec. 31, 1915, p. 3, col. 3; Presidential passport rules of Dec. 17, 1915, exec. order 2286A, For. Rels., 1915 Supp., p. 912, Compilation, p. 202; exec. order 2341, Mar. 13, 1916; see also U. S. Comm. on Public Information, Official Bulletin, Vol. 1, no. 32, June 16, 1917, p. 1; 65:2 Cong. rec., p. 6066.

A like control system was established September 4, 1939, after the outbreak of the present war (Appendix, pp. 110-113).

**See Recommendations by the Attorney-General for legislation amending the criminal and other laws of the United States with reference to neutrality and foreign relations, 1916 (reprinted in his Annual Report, 1916).

***See 64:1 Cong. rec., pp. 12129, 12411, 12404; S. 6797 and H. R. 17369 were the passport bills introduced.

****64:2 Cong. rec., pp. 2614, 2819, 3075, 3498, 3665, 3782; H. rep. 1591, Feb. 28, 1917, serial no. 7110; House Judiciary Comm., Hearings on S. 8148 to punish espionage and interference with neutrality, Feb. 22, 1917.

In the first session of the 65th Congress a consolidated bill (including passport provisions) was reintroduced, and in differing forms was passed by the House and Senate early in May. The bill went into conference and emerged at the end of May without material change in the passport sections. It was enacted June 15, 1917.*

*H. rep. 30 on H. R. 291, April 25, 1917, serial no. 7252; H. rep. 65, conference report on H. R. 291, May 29, 1917, serial no. 7252; 65:1 Cong. rec., index, history of bills S. 2 and H. R. 291.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 287

EARL RUSSELL BROWDER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

**ON PETITION FOR WRIT OF HABEAS CORPUS TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.**

REPLY BRIEF FOR PETITIONER.

WALTER H. POLLAK,
Counsel for Petitioner.

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INDEX.

CASES CITED.

	Page
<i>Helvering v. Wilshire Oil Co.</i> , 208 U. S. 90	1
<i>Morrissey v. Commissioner</i> , 296 U. S. 344	1
<i>Townsend v. United States</i> , 95 F. (2d) 352, cert. den. 303 U. S. 664	2

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 287

EARL RUSSELL BROWDER,

Petitioner,

vs:

THE UNITED STATES OF AMERICA.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR PETITIONER.

(1)

The Government's brief (p. 8) cites *Helvering v. Wilshire Oil Co.*, 208 U. S. 90, 100, and *Morrissey v. Commissioner*, 296 U. S. 344, 354, for the principle that administrative regulation may give a construction to—even change the construction of—a statute. Assume, if you will, that the principle applies in a criminal case. It cannot apply in this case:

The Government relies upon a "Notice to Bearers of Passports" as in the Government's view casting some light on the meaning of "use" in the statute. But (a) the Notice is not a regulation. The Notice does not call itself a regulation and does not purport to regulate. It makes reference,

among other things, to the action of foreign governments—which cannot possibly be the subject of regulation by our own. And (b) “use” does not appear in the Notice.

(2)

The Government's brief (pp. 11-12) excerpts a clause or two about “wilful” from the opinion of the District of Columbia Court of Appeals in *Townsend v. United States*, 95 F. (2d) 352, cert. den. 303 U. S. 664. In *Townsend's* case the wilful act was a negative act, a “refusal” to testify. As to that kind of act wilfulness may mean little more than with deliberation. Above all, the trial court in *Townsend's* case gave the following charge—“purporting,” as the Court of Appeals remarked (95 F. [2d], at 361), “to be based on the *Murdock Case*”—“If you believe that the reasons stated by the defendant in his refusal to remain longer at the Committee hearing were given in good faith and based upon his actual belief you should consider those reasons in determining whether or not his refusal to remain was wilful.”

(3)

Petitioner has not “fallen upon another horn of his dilemma” (Gov. brief, p. 13). Petitioner's point is *not* that the crime of which he was convicted is without moral turpitude. His point on the contrary is that the accusation is of a morally wrong act—done “wilfully and knowingly”—and that on the undisputed facts there was no moral turpitude and no wilfulness. The presentation by a citizen, in order to establish his citizenship, of a passport that correctly declares the fact of citizenship is not wilful wrong—not wrong at all.

Respectfully submitted,

WALTER H. POLLAK,
Attorney for Petitioner.

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CLERK

Supreme Court of the United States

OCTOBER TERM, 1940

No. 287

EARL RUSSELL BROWDER

Petitioner

against

UNITED STATES OF AMERICA

BRIEF FOR PETITIONER

CARL S. STERN

Counsel for Petitioner

CARL S. STERN

CAROL KING

BENJAMIN GOLDRING

Of Counsel

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SUBJECT INDEX

	PAGES
Opinion of the Court Below	1
Jurisdiction	1
Statement	2-4
Summary of Argument	4-5
Argument	6-30

FIRST POINT: The "use" for which petitioner was convicted was not the kind condemned by the statute. It was not a passport use. It did not invoke the protection of the United States abroad. It was not willful, fraudulent, or otherwise evil 6-22

SECOND POINT: There was no evidence of willfulness or of any evil use or purpose 23-30

Act of June 15, 1917, Title IX, 22 U. S. C. §§ 213, 220-2 31-33

TABLE OF AUTHORITIES

Cases:

	PAGES
Am. Telephone and Telegraph Co. v. U. S.	13n
Apex Hosiery Company v. Leader	19-20
Atlantic Cleaners and Dyers v. United States	18n
Berger v. U. S.	26n
Boyd v. United States	28n
Chippewa Indians v. U. S.	13n
Commonwealth v. Welosky	21
DeJonge v. Oregon	12
DeLima v. Bidwell	20, 21
Fasulo v. United States	19n
Felton v. United States	11, 12n
Herndon v. Lowry	13n
Hygrade Provision Co. v. Sherman	13n
Lanzetta v. New Jersey	12
McBoyle v. United States	19
Miller v. Sinjen	15n
People v. Clark	25n
Prussian v. United States	19
Puerto Rico v. Shell Co.	20, 21
St. Louis and San Francisco Railroad Co. v. United States	11
Securities Exchange Commission v. United States Realty and Improvement Co.	20n
State of Missouri v. Missouri Pacific Railway Co.	21
State v. Willson	28n
Stromberg v. California	12
United States v. Adielizzio	19
United States v. American Trucking Ass'n	20
United States v. Cohn	19
United States v. Fruitgrowers Express	19
United States v. Katz	19
United States v. Murdock	12n, 13, 18n, 29
United States v. Warszower	12, 18n
Urtetiqui v. D'Arcy	16

Other Authorities:*Statutes:*

	PAGES
Act of June 15, 1917, Title IX, U. S. C. Title 22, §220	2, 6, 9, 10, 11, 12, 13, 14, 16, 17, 18, 20, 22, 31-33
Act of March 2, 1921, 22 U. S. C. §227	18n
Bankruptcy Act, Chap. XI, U. S. C. Supp. V, §§701 et seq.	20n
Conservation Law of New York, §180(3)	17n
Espionage Act,—see Act of June 15, 1917, <i>supra</i> .	
Judicial Code, §240(a), as amended by the Act of Feb. 13, 1925, 43 Stat. 938	1
U. S. C., Title 46, §686	19

Administrative:

For. Rel. 1914 Supp. p. xii, Sec'y of State, Wm. J. Bryan, Letter of, to Chairman Stone of Senate Committee on For. Rel. Jan. 20, 1915	7
For. Rel. 1916 Supp. pp. 7-8, State Dept. Counselor, letter of, to John J. Fitzgerald, Aug. 18, 1916	7n
Notice Concerning Use of Passports	17n
Notice to Bearers of Passports	17n
Presidential Rules Governing the Granting and Issu- ing of Passports in United States	15n
Recommendations of the Attorney General (1916) ..	8, 9, 10n
Report of the Judiciary Committee of the House of Representatives (1917)	11

Miscellaneous:

	PAGES
Borchard, Edwin M. Diplomatic Protection of Citizens Abroad, N. Y. (1916)	15, 16
Hall, Livingston, The Substantive Law of Crimes, 50 Harv. L. R. 616	13n
Hunt, Gaillard, Dept. of State, The American Pass- port (ed. 1898)	16
Lansing, Robert, War Memoirs of (1935)	8, 10n
Maxwell on Interpretation of Statutes, 6th ed.	20, 21
Moore, John Bassett, 3 Digest of International Law ..	15, 16n
National Commission on Law Observance and Enforce- ment, Report to	26n
N. Y. Times	
Jan. 3, 1915	10n
Jan. 4, 1915	7n
Feb. 25, 1915	10n
Mar. 9, 1915	10n
Mar. 17, 1915	10n
Oct. 19, 1915	10n
Jan. 28, 1916	10n
Mar. 29, 1916	10n
Apr. 7, 1916	10n
July 19, 1940	16
United States Committee on Public Information: Ger- man Plots and Intrigues in the United States dur- ing the period of our neutrality	11n

Supreme Court of the United States

OCTOBER TERM, 1940

No. 287

EARL RUSSELL BROWDER

Petitioner

vs.

THE UNITED STATES OF AMERICA

BRIEF FOR PETITIONER

I.

Opinion of the Court Below

The opinion of the Court of Appeals, Second Circuit, was reported in 113 Fed. (2d) 97. It appears in R. 399-403.

II.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered June 28, 1940 (R. 404). The petition for Certiorari was filed July 29, 1940 and granted October 14, 1940 (R. 405).

The jurisdiction of this Court is conferred by Judicial Code, Sec. 240 (a) (28 U. S. C., Sec. 347) as amended by the Act of February 13, 1925, 43 Stat. 938.

III.

Statement

Earl Russell Browder, the petitioner, is a native citizen of the United States, born in Wichita, Kansas. He appeals from a judgment convicting him of violating §2 of Title IX of the Act of June 15, 1917, U. S. C. Title 22, §220.¹

The conviction was for "using a passport secured by reason of a false statement".

The false statement counted on was that in reply to a question in a passport application "my last passport was obtained from", petitioner wrote in "None". The government adduced evidence that the statement "None" was inaccurate,—that petitioner had in 1921, 1927, and 1931, obtained passports in other names: Dozenberg, Morris, Richards.

On August 31, 1934, petitioner applied for a passport in his own name. It was that application that contained the statement "None" (R. 305). Upon that application a passport was issued on September 1, 1934. It expired on September 1, 1936.

¹Sec. 2 reads as follows:

"Whoever shall willfully and knowingly make any false statement in an application for passport with intent to induce or secure the issuance of a passport under the authority of the United States, either for his own use or the use of another, contrary to the laws regulating the issuance of passports or the rules prescribed pursuant to such laws, or whoever shall willfully and knowingly use or attempt to use, or furnish to another for use, any passport the issue of which was secured in any way by reason of any false statement, shall be fined not more than \$2,000 or imprisoned not more than five years or both."

The indictment was under the second clause of §2.

Section 2 is one of four sections of Title IX of the Espionage Act of June 15, 1917. Title IX is printed in full at the end of the brief *infra* pp. 31-3. The history and background of the statute is discussed *infra* pp. 7-9.

Five months after its expiration, petitioner applied for a renewal of the 1934 passport. The renewal application contained no misstatement. No representation as to other passports was called for or made. The non-Browder passports had all expired. The representation "None" was not repeated. The *last* passport, that of September 1, 1934, was presented for renewal and on the day of its presentation, February 2, 1937, it was stamped "renewed to September 1, 1938".

The passport on the use of which the indictment rests, charged to have been secured by a false statement, is the 1934 passport, after its expiration and renewal. Petitioner was not indicted for making a false application for a passport.² (If the representation "None" would have sustained such a charge, the prosecution for that offense would have been outlawed in 1937, two years before this indictment was filed.) The indictment charges and the conviction rests upon the "willful and knowing use" of a passport alleged to have been fraudulently secured.

The "use" charged to have been "knowing and willful" was the use of the 1934 passport after its expiration and renewal. The indictment charges the use on two occasions, each made the subject of a separate count: on April 30, 1937 and again on February 15, 1938, petitioner handed to the immigration inspectors in the port of New York the passport which correctly described his native birth. Petitioner needed no passport to enter the United States. A birth certificate, baptism certificate, an expired passport, or other satisfactory proof might have been exhibited to establish that he had been born in Kansas.

The statute under which petitioner was convicted was recommended for passage in 1916, before this country entered the World War. It was designed to stop the use of American passports in violation of our neutrality. The

²The first clause of §2 quoted *supra* makes provision for such a prosecution.

message transmitting the statute to Congress called for punishment "for the person who *fraudulently obtains* or *fraudulently uses* a passport". The trial court charged that the words "willful and knowing" mean "deliberately and with knowledge and not something which is merely careless or negligent or inadvertent" (R. 292-3).

For the two "uses" as so defined, petitioner was convicted of felony and sentenced to four years in prison,—two years, to run consecutively, for each use,—and was fined \$2,000.

IV.

SUMMARY OF ARGUMENT

First Point

The indictment does not charge the commission of an act that the statute made criminal.

Petitioner is not and could not have been indicted for fraudulently obtaining a passport, for if the representation "None" were false and material, the offense had been barred by the Statute of Limitations for more than two years prior to the filing of the indictment. By indicting petitioner for what was an innocent *use* of the passport, the government in effect got around the Statute of Limitations, but it was compelled to distort the term "willful and knowing use" beyond the spirit and purview of the passport act.

The act aimed to prohibit passport uses which were dishonest in themselves—uses fraudulently invoking the protection or safe-conduct of the United States in foreign relations. Such uses it denominated willful.

Petitioner was not charged with anything dishonest or evil. The passport was issued to him in his name and correctly described his native birth. He was not, in

presenting it to the immigration inspectors in New York, invoking the privilege of the safe-conduct of the United States. He was exercising his absolute right as a citizen to enter his native country. No passport was necessary for this purpose,—only some documentary or other evidence to establish that he was not an alien.

The position taken by the Solicitor General in opposing certiorari—that it is not necessary to show an evil intent to establish a willful use—is irreconcilable with the history and background of the legislation and is directly opposed to the position taken by the Attorney General who sought the legislation and by a United States Attorney charged with its enforcement.

Second Point

A verdict should have been directed for petitioner since there was no evidence of a wilful use of a passport,—no showing of any evil use. The document was used by petitioner to certify truthfully to the fact of his American birth.

The absence of evidence of bad faith in the use of the 1934 renewal passport led the United States Attorney to focus the attention of the jury unfairly and confusingly upon the use or acquisition of earlier passports,—passports issued to the petitioner not in his own name as was the 1934 passport, but in other names.

The court erroneously charged willfulness out of the case; he instructed the jury that a deliberate or intentional use of the document constituted a willful and knowing use.

ARGUMENT

FIRST POINT

The "use" for which petitioner was convicted was not the kind condemned by the statute. It was not a passport use. It did not invoke the protection of the United States abroad. It was not willful, fraudulent, or otherwise evil.

The "use" for which petitioner has been indicted is the presentation of a passport as truthful proof of his Kansan birth (R. 347). He was not using the passport to invoke the protection or safe-conduct of the United States abroad. He was exercising his right as a citizen to enter his country. No passport was necessary. The demonstration that he was not an alien could have been made through the use of a birth certificate, a baptism certificate, an expired passport,—any satisfactory proof. This innocent use has now been adjudicated criminal on the ground that the document that he presented was tainted,—the passport had been acquired by the representation "None". The representation, it will be observed, had nothing whatever to do with the correctness of the statement in petitioner's application that he was an American citizen.

If the representation "None" was false and material petitioner might have been indicted under §1 of Title IX for perjury or under the first clause of §2 of that Title for the fraudulent obtaining of a passport. The time to bring such indictments expired in 1937, over two years before this indictment was filed. The government has in effect circumvented the Statute of Limitations by convicting petitioner for the use of the passport.

Title IX, the chapter of the Espionage Act relating to passports³, in prohibiting "willful" uses of passport aimed to prevent *dishonest* uses of the *safe-conduct* of the United States in *foreign relations*. The exigencies of the

³Printed in full *infra* pp. 31-33.

case require the government to extend "willful" use of passports to include something not dishonest, not connected with the safe-conduct of the United States, and having nothing to do with foreign relations.

It is submitted that there is no warrant for the legalistic construction of the term "willful use" by which the government seeks to justify the conviction of petitioner.

1. The mischief that the statute was designed to prevent was passport frauds,—the misuse of passports largely by Germans or German sympathizers to get back to the Central countries.

By 1915 notorious passport frauds were bringing our passports into disrepute.⁴ As early as January 20, 1915, Secretary Bryan, in answer to a letter of Chairman Stone of the Senate Committee on Foreign Relations, explained why American "citizenship papers and passports" were being disregarded. There were authentic cases, he said, "in which American passports have been fraudulently obtained and used by certain German subjects". He found indications of "a systematic plan" to obtain American passports through fraud for the purpose of securing safe passage for German officers and reservists desiring to return to Germany. "Such fraudulent use of passports" he added, "by Germans themselves, could have no other effect than to cast suspicions upon American passports in general".⁵

⁴On the arraignment of one Carl Ruroede on January 3, 1915 for supplying German reservists with passports, the prosecution contended "that the use of false passports has three bad effects. It discredits the United States Government in the eyes of foreign countries; it makes foreign officials less regardful of the lives of genuine American citizens and it turns loose American passports which could be used again and again in countries where the exact regulations are unknown and lead to incidents such as that of the spy Lody" (N. Y. Times, Jan. 4, 1915. Carl Hans Lody, a German, executed in London as a spy, carried an American passport.)

⁵This language is later quoted in a letter from the State Department to Representative John J. Fitzgerald, dated August 18, 1916 (Appendix, pp. 43-44).

In reviewing the situation in later years, Secretary Lansing wrote of "the *improper use* of passports issued by the United States and by other neutral countries to secure the *safe passage* of Germans through the enemy's line of blockade to ports in neutral territory and adjacent to Germany which was their ultimate destination" (War Memoirs of Robert Lansing [1935] p. 73, italics ours).

2. The Government asked Congress for legislation to punish "the person who fraudulently obtains or fraudulently uses a passport".

In May, 1916, Attorney General Gregory, mindful of these evils, submitted certain recommendations to Congress. These recommendations were concurred in by the Secretary of State and by the joint State and Navy Neutrality Board (Appendix pp. 11-13). The Attorney General recommended the passage of "Legislation Amending the Criminal and Other Laws of the United States *With Reference to Neutrality and Foreign Relations*". For this purpose he submitted eighteen bills with separate recommendations explaining each bill.

Recommendation V⁶ referred to the passport bill. This recommendation called for legislation requiring applications for passports to be under oath and making false statements in such applications perjury. It sought to make criminal the fraudulent obtaining, transfer or use of passports and the alteration or forging of passports.

There should, said the Attorney General, "be punishment for the person who *fraudulently obtains or fraudulently uses a passport*."

The passport bill which the Attorney General submitted to carry out this recommendation was entitled "To regulate and safeguard the issuance of passports, and to pre-

⁶Printed in full in Appendix pp. 11-12.

vent and punish the fraudulent obtaining, transfer, use, alteration, or forgery thereof".

The various bills which the Attorney General submitted "relating to foreign relations and neutral obligations of the United States were combined" and to them "was added an espionage measure". "This combined statute was popularly given the title of the 'Espionage act' although the espionage feature was not in reality the most important portion of the bill".⁷

3. Title IX as passed embodied the recommendations of the Attorney General. The uses it prohibits are fraudulent uses. The term used to describe those uses is "willful and knowing".

The terms of the statute were substantially identical with those in the bill that was drafted and presented by the Attorney General.⁸

The *fraudulent uses* of passports are covered by §2 (second clause), §3 and §4.⁹ Each bans the dishonest use of a passport: §2 of a passport dishonestly obtained through means of a false representation; §3 of a passport intended for another or in willful violation of restrictions; §4 of a

⁷1917 Report of Attorney General (Appendix p. 18).

Besides passports the Espionage Act covers such subject-matters as the injury and destruction of goods and plants; vessels and cargoes; conspiracies to destroy properties in foreign countries; false impersonation of foreign representatives; false swearing to influence agents of foreign countries; provisions for the detention of vessels to prevent violations of neutrality; control over radio; and similar matters. (Public No. 24, 65th Cong., 1st Sess.).

⁸The changes are indicated in the Appendix pp. 6-9.

⁹The fraudulent obtaining of passports is covered by §1 and the first clause of §2 of Title IX. The Attorney General had doubts whether an oath required merely by a regulation was sufficient foundation for a perjury charge. (Appendix p. 11.) Accordingly, §1 required applications to be under oath which automatically made them perjury. §2 makes criminal the willful and knowing making of a false statement in an application with intent to induce the issuance of a passport.

forged passport or of one which had ceased to be usable as a passport.

Section 2 (second clause) §3 (first and third clauses) §4, made criminal the dishonest use of dishonestly procured passports. Such uses were rife at the time, for German agents were using passports issued in American names on fraudulent identification¹⁰; or they were using American passports which had been purchased or stolen¹¹ or they were using passports which had been forged¹².

The use clauses had a common factor. They were all addressed to dishonest uses and all except one to dishonest uses of passports dishonestly procured. They were uses in themselves evil,—the use of a passport to invoke fraudulently the protection of the United States abroad.

¹⁰The German spy Stegler (Stoegler) obtained a passport by impersonating an American named Madden (Appendix pp. 17, 48, N. Y. Times, Feb. 25, 1915, p. 1, col. 3; March 17, 1915, p. 4, col. 2. Franz von Rintelin was indicted for applying for a passport in the name of Gates. (Appendix p. 15, N. Y. Times, Oct. 19, 1915, p. 2, col. 6.) Von der Goltz, said to have been a confessed German spy, had a passport under the name of Bridgman Taylor (N. Y. Times, March 29, 1916, p. 1, col. 13; April 7, 1916, p. 20, col. 2). Harry Max Zelinka pled guilty to an indictment charging him with having aided Bondy, a German, to procure a fraudulent American passport under the name of Harold Green. (Appendix p. 15, N. Y. Times, Jan. 28, 1916, p. 4, col. 7.)

¹¹The passport of Berko, an American citizen, had been stolen by Stephen Csiszar, an attaché of the Austro-Hungarian Consulate in New York City (Appendix p. 49). Carl Ruroede was arrested for furnishing passports to four young German reservists. (Appendix p. 9, cf. pp. 46, 47-48, N. Y. Times, Jan. 3, 1915, p. 1, col. 3; and March 9, 1915, p. 4, col. 1.)

¹²Capt. Von Papen was in charge of an office in the German Embassy in New York where passports were "forged by wholesale" (Committee on Public Information, Appendix p. 45. Statement of Attorney General in his recommendations to Congress, Appendix p. 12).

Capt. Von Papen had paid money to Carl Ruroede, the dealer in fraudulent passports (War Memoirs of Robert Lansing p. 79). Capt. Boy-Ed was implicated with Von Papen in the passport frauds (id. p. 74) and it was because of Boy-Ed's connection with the passport frauds that his recall from the United States was requested (id. p. 80).

The words employed to describe these prohibited "fraudulent" or "unneutral"¹³ uses were "willful and knowing".

The Judiciary Committee of the House in reporting the Bill made it clear that they had striven to "avoid making innocent acts criminal" (Appendix p. 25). The Committee was referring to Title I of the Act, the title relating to Espionage, but there is no doubt that the word willfully was used to make certain that only criminal acts would be punished¹⁴.

At the time of the passage of Title IX there was no doubt that the words "willful and knowing" meant evil or dishonest uses. *Felton v. United States*, 96 U. S. 699, 702, 703; *St. Louis and San Francisco Railroad Co. v. United States*, 169 Fed. 69, 71 (C. C. A. 8).¹⁵

¹³"There are many cases from which the following are a selection, in which American passports were fraudulently procured and used for unneutral purposes". The report then mentions some of the cases referred to *supra*. (United States Committee on Public Information: German plots and intrigues in the United States during the period of our neutrality. Appendix p. 48.)

¹⁴For example; the committee says in referring to §5 of Title I—"Section 5 of Title I makes it a crime for any person to willfully convey false reports or statements with the intent to interfere with the operation or success of the military and naval forces of the United States, or to promote the success of the enemy, and for anyone in time of war to willfully cause, or attempt to cause, insubordination, disloyalty, or refusal of duty in the military or naval forces. 'The committee feel that no patriotic American will ever attempt willfully to violate the provisions of this section' (Appendix p. 26).

¹⁵"Doing or omitting to do a thing knowingly and willfully implies no want of knowledge of the thing but a determination with a bad intent to do it or to omit doing it", said Mr. Justice Field writing for a unanimous court in 1877, reversing a conviction. "Willfully means something not expressed by a knowingly' else both would not be used conjunctively", stated Van Devanter, J., in 1909, writing for the unanimous 8th Circuit, reversing a conviction. (*St. Louis and San Francisco Railroad Co. v. United States*, 169 Fed. 69, 71.)

There is no doubt today (*United States v. Murdock*, 290 U. S. 389)¹⁶.

The Solicitor General now argues that a "willful and knowing" use may mean one "not involving moral turpitude" and having no implication of evil purpose¹⁷.

This argument, though necessary to support the conviction, might be dismissed as refuted by the history and the purposes of Title IX. We go further however, and show that the precise contention was rejected by other officials in the Department of Justice in construing the same clause of the same section of the same title.

In 1940,—when this very §2 of Title IX came up for interpretation—the United States Attorney for the Southern District of New York, in *United States v. Warszower*, 113 Fed. (2d) 100,¹⁸ insisted that the statutory phrase "willful use" meant an evil use.

The indictment there charged that Warszower was not a citizen, that he had obtained a passport by a fraudulent misrepresentation, and that he had used this passport for the purpose of securing entry into the United States. The United States Attorney sought to distinguish cases like *Stromberg v. California*, 283 U. S. 359, *DeJonge v. Oregon*, 299 U. S. 353, *Lanzetta v. New Jersey*, 306 U. S. 451, cited by the appellant as holding that the term "use

¹⁶The opinion of the court construing "willfully" says, p. 394, "the word often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose" citing the *Felton* and other cases.

The court in the *Murdock* case in arriving at the meaning of the word "willfully" called to its aid the other offenses "which the statute denounces in the same sentence only if willful" "in ascertaining the meaning" of the offense there charged, p. 395.

¹⁷Brief in opposition to Certiorari, pp. 13-14.

¹⁸The *Warszower* case was decided in the Circuit Court of Appeals about the same time as the *Browder* case. Certiorari was granted in both cases on the same day. The *Warszower* case is #338 on the calendar of this court.

was so indefinite as to suggest its unconstitutionality".¹⁹
He said:

"* * * in none of the three cases cited was a specific criminal intent required for violation of the statutes held invalid. The statute in the instant case [a conviction under Section 2], and its cognate sections, punish only one who 'willfully and knowingly' uses a passport contrary to the terms of the statute. The words 'willfully and knowingly' import that the prohibited use of the passport be with bad faith and evil intent. *United States v. Murdock*, 290 U. S. 389 (1933). An illegal use of a passport by one innocently supposing that such use was proper would not support a conviction under either Section 220 or 221 or 222 of Title 22 [Sections 2, 3 and 4 of Title IX]. The hazards of criminal prosecution do not attend innocent mistake. The *criminal intent* required by the instant statute distinguishes it from the statutes in the cases cited by appellant." (Government's Brief before the Circuit Court of Appeals, p. 24; italics ours.)²⁰

¹⁹This contention was made (R. 232-3) and preserved in this case (R. 233, 236, 386-7).

²⁰The United States Attorney undoubtedly had in mind the following principles of statutory construction: A statute so vague and uncertain as to make criminal an act innocently done without any evil purpose would arbitrarily restrict constitutional guarantees. *Herndon v. Lowry*, 301 U. S. 242, 258-259. "An act of Congress should not be given a construction which will imperil its validity where it is reasonably open to a construction free from such peril". *Chippewa Indians v. U. S.*, 301 U. S. 358, 376. "A clear requirement of an unlawful intent may save a statute which defines the acts required for liability in an indefinite manner". Livingston Hall, *The Substantive Law of Crimes*, 50 Harv. L. R. 616, 638. *Hygrade Provision Co. v. Sherman*, 266 U. S. 497, 502-503; *Am. Telephone and Telegraph Co. v. U. S.*, 299 U. S. 232, 245.

4. The willful and knowing use that was made criminal was a passport use, one that misused the safe-conduct of the United States in foreign relations.

The evils at which the Act aimed were violations of our neutrality; the fraudulent attempts "to secure safe passage for German officers and reservists desiring to return to Germany" (supra p. 7); "improper use * * * to secure safe passage of Germans through the "British blockade" (supra p. 8).

The controls of Title IX were aimed at international relations. Attorney General Gregory, in his reports, apprised Congress of the "inadequacy of our criminal laws relative to neutrality and foreign relations, and the necessity for their complete revision * * *" (Appendix p. 14). And the recommendations that he submitted were recommendations amending the criminal and other laws of the United States "with reference to neutrality and foreign relations" (Appendix p. 10).

In transmitting the recommendations the Attorney General informed Congress that he had consulted the State Department and the State and Navy Neutrality Board, who he said, concurred in the recommendations (Appendix pp. 11, 13). There is no suggestion that he consulted the Department of Labor which then had jurisdiction over entry into the United States,—the department whose inspectors decided whether persons entering were American citizens or aliens.

Congress could not have contemplated that it was making criminal the use of passports to facilitate entry into this country, for in 1917, when the Act was passed there was no requirement that a citizen entering the United States have a passport. On the contrary, on January 24, 1917, President Wilson in laying down rules covering the granting and issuance of passports, said "Passports issued by the Department of State or its diplomatic or consular representatives are intended for identification and protection in foreign countries, *and not to facilitate entry into*

the United States, immigration being under the supervision of the Department of Labor²¹.

What John Bassett Moore (3 Digest of International Law 58) had written in 1906 remained true in 1917, and as to citizens in 1937 and 1938: "there is neither law nor regulations in the United States requiring those who resort to these territories to produce passports".

Though a passport may incidentally identify the holder, its essence is that it extends to the holder the protection of the United States abroad. That is what the passport says: "I, the undersigned Secretary of State of the United States of America, hereby request all whom it may concern to permit safely and freely to pass and in case of need to give all lawful aid and protection to Earl Russell Browder a citizen of the United States"²² (R. 315). The protection of the United States is a privilege which may be withheld in the discretion of the Department of State.²³ And the "protection of the United States" once granted "may be withdrawn" if the person uses a passport in violation of its conditions or restrictions.²⁴

With this interpretation of the passport, the authorities are in accord. "The issuing of passports is a convenient system adopted by States to secure for their citizens a right of transit through *foreign* countries" (Borchard, *Diplomatic Protection of Citizens Abroad*, N. Y. [1916], p. 493, *our ital.*). A passport "is a document, which, from its nature and object, is addressed to *foreign* powers".

²¹This provision is likewise contained in the Presidential passport rules of:

June 7, 1911, rule 4, par. 3; Nov. 13, 1914, rule 4, par. 3; Jan. 12, 1915, rule 5, par. 3; Dec. 17, 1915, rule 6, par. 2; Apr. 17, 1916, rule 6, par. 2.

²²The United States Attorney, in his summation refers to the passport as "one of the most solemn and sacred documents that it lies in the possession of our country to give; it is safe-conduct to one of its citizens".

²³*Miller v. Sinjen*, 289 Fed. 388, 394.

²⁴Rules issued by President Roosevelt March 31, 1938 (Appendix p. 21).

(*Urtetiqui v. D'Arcy*, 9 Pet. 692, 699, our ital.). A passport "certifies that the person therein described is a citizen of the United States and requests for him while *abroad* permission to come and go as well as lawful aid and protection" (Borchard, *supra*, our ital.). A passport "is intended *only* for use *abroad*, and has no sanctioned uses, customary or statutory, within the United States²⁵ in time of peace" (Dept. of State, *The American Passport* [Gailard Hunt, ed., 1898], p. 4, our ital.).

Besides granting the privilege of the protection of the United States, the passport may also serve as evidence of the holder's citizenship. But a passport need not be valid as a passport to serve as such a means of identification. An expired passport, for example—whose *willful* use for *passport* purposes would be criminal under Sections 3 and 4 of Title IX—may serve for this purpose. A recent instance is described in the New York Times of July 19, 1940. It told how Americans who had lived abroad for years, and who were fleeing the war zones of Europe, identified themselves as American citizens by presenting "faded and outdated passports,—some as old as twenty and thirty years" "at the immigration tables" in the Port of New York.

Similarly, an old passport may be used for identification in applying for a new passport. Once it was decreed that only a non-expired passport would serve for this purpose, but in 1901 the regulation was revoked and the new regulations provided that an old passport could be used for this purpose without regard to the time or place of its issuance.²⁶

For the purpose of identification, a passport valid or expired is on no higher plane than a birth certificate, a

²⁵The court below objected to Mr. Hunt's use of the phrase "within the United States", pointing out that a common use of a passport is the presentation in the United States to obtain a visa (113 Fed. [2] 99). But the objection does not affect the principle for the purpose of the visa is to make the passport efficient as a safe-conduct abroad,—it is necessary to have passports *visaed* for entry into certain countries.

²⁶3 Moore's Digest of International Law 913-4; Compilation, p. 3.

baptism certificate or anything that will satisfy the immigration inspector that the person entering the country is not an alien (R. 122, 128).²⁷ Many activities in the United States can be undertaken only by citizens. The various departments in charge may require proof of citizenship. Some may accept passports as such proof. It is a far cry from the purposes of Title IX to assume that the use of a passport to prove one's citizenship to obtain a license to fish or hunt in the Nunivak Island Reservation or to assert a claim to public lands or to obtain a pilot's license is within Title IX.²⁸ But hardly more so than the conten-

²⁷And so Americans travelling abroad were notified by the State Department—"Each native American citizen leaving the United States without a passport is advised to have in his possession a birth or baptismal certificate or a sworn statement from a reputable American citizen certifying to the place and date of his birth while each naturalized citizen should carry his certificate of naturalization. This evidence is often necessary to obtain return passage (to the United States), and is useful to insure speedy reentry into the United States". (Notice Concerning the Use of Passports—the parenthesis is in the original text; series 1921-1925.)

In the notice to bearers of passports current in 1937 and 1938, the State Department though advising Americans to carry passports, said, for the benefit of those who travel without them "American citizens who leave the United States without passports, should carry with them proof of their citizenship, such as birth, baptism or naturalization certificates". (Notice to Bearers of Passports.)

²⁸The extremes to which the government's contentions might lead—the possibilities of using innocent acts to revive offenses long barred by the Statute of Limitations, may be illustrated by a hypothetical case. A person is indicted under a *traffic law* so drawn as to make criminal the willful use of an automobile license procured by a misrepresentation. The history of the traffic law shows an intent to prevent operation of automobiles by an unauthorized person. The license holder uses the automobile license certificate to prove his residence in order to obtain a trapper's license. The Conservation Law of the state (like §180 [3] of the Conservation Law of New York) makes an automobile license proof of residence for this purpose. The license holder is indicted because years before he had obtained an earlier license upon an application correctly reciting his residence but withholding certain facts about a prior conviction for speeding. At the time of the indictment the Statute of Limitations barred prosecution for the concealment of the conviction for speeding.

tion made here, for petitioner was not exhibiting his passport invoking a privilege—not the privilege of the protection of the United States abroad, or of a license to fish or any other kind of a license. He was asserting a right.

When petitioner returned to the United States in 1937 and 1938 he needed no passport. None was needed in 1917 when the Act was passed. From that time to this except for the war period (1918-1921)²⁹ no passport was needed for returning Americans. All that was required was that petitioner on his return satisfy the immigration service by any kind of suitable evidence that he was not an alien.

5. The term "use" prohibits employment of a fraudulent and deceptive passport in connection with safe conduct abroad; its meaning may not, in a criminal statute, be stretched to include an act that had no connection with safe conduct abroad and deceived no one.

Since §§2, 3 and 4 of Title IX ban *dishonest passport* uses and since all misuses are made felonies punished by the same severe penalties, the principles of statutory construction exclude the extension of the term to cover *innocent, non-passport* uses. "There is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning"³⁰ unless some

²⁹In 1918 Congress passed an act establishing war time control of the entry of citizens and aliens. This act required from citizens and aliens alike the possession of a passport as a condition to entering the United States. The act of 1918 was a war statute. With the end of the war it lapsed as to citizens. The State Department sought to have the act continued as to citizens as well as to aliens (Appendix p. 39). It was continued as to aliens by act of March 2, 1921, 22 U. S. C., §227, Appendix p. 41. But Congress deliberately refused to continue it as to citizens (Appendix pp. 39, 40, 41).

³⁰*Atlantic Cleaners and Dyers v. United States*, 286 U. S. 427, 433.

In the *Murdock* case the Supreme Court (290 U. S. 389, 395) and in the *Warsawer* case, the United States Attorney, *supra* p. 13 resorts to the cognate sections of the statute to construe the term "willfully". Here not only the cognate sections, but—the history of the legislation shows—the very language on which the indictment rests (the second clause of §2) employs the term "willful" to ban uses that are fraudulent or deceptive.

controlling purpose indicated by the history of the statute requires that they be given a different meaning. Here, as we have seen, the history of the act shows that the term "willful use" meant throughout the act a fraudulent or deceptive use.

And this would be the construction even if at the time the act was passed it had been the practice of returning Americans to identify themselves in the home port by exhibiting their passports. For criminal statutes are not broadened to embrace acts not within their scope and purview. There are no such things as constructive crimes.³¹

And this would be true had the act complained of actually been evil, but the kind of evil which though within the letter was not within the spirit and intentment of the statute. *United States v. Cohn*, 270 U. S. 339, 345; *Fasulo v. United States*, 272 U. S. 620, 629; *United States v. Katz*, 271 U. S. 354-357; *McBoyle v. United States*, 283 U. S. 25, 27; *United States v. Adielizzio*, 77 Fed. (2) 841, 843³²; *United States v. Fruitgrowers Express*, 279 U. S. 363, 370; *Prussian v. United States*, 282 U. S. 675, 677. Literal construction is not carried so far, *Apex*

³¹*Fasulo v. United States*, 272 U. S. 620, 629.

³²*Adielizzio* had been convicted of conspiring to aid persons to procure by fraud, seamen's protection certificates. These certificates are issued by the Collector of Customs. They certify to the citizenship of seamen. The section describing them (46 U. S. C., §686) refers to them in the caption as certificates of citizenship.

The Statute under which *Adielizzio* was convicted (18 U. S. C. 139) has four clauses; two relate to the fraudulent procurement or possession of "certificates of citizenship" without qualifying them; the other two contain references limiting them to certificates connected with naturalization proceedings.

The court reversed the conviction holding that since the history of the Penal Statute showed that it was intended to prevent naturalization frauds the term "certificate of citizenship" must be limited accordingly.

Hosiery Company v. Leader, 310 U. S. 469, 489; *United States v. American Trucking Ass'n*, 310 U. S. 534, 542-4.³³

A fortiori, the Statute is not to be extended to different concepts not in the minds of the legislators at the time Title IX was passed. The court below avoided this obstacle by stating that from 1930 on, the use of the passport for identification had become "a sanctioned use" (R. 402). The question is not whether the use had become a sanctioned use in 1937 and 1938. The use of a passport to identify one as a citizen to enable him to procure a trapper's license might be sanctioned too. The use of an expired passport regardless of its age, for purposes of identification, has for years been sanctioned when one is applying for a new passport.³⁴

The question then is not whether the use had become a sanctioned use. The question is whether the use was the kind of thing that Congress intended to make criminal. The court below said that a statute "is prospective and its application to a given state of facts may change as new things or new uses of old things come into existence" and for that principle, the court cited "*DeLima v. Bidwell*, 182 U. S. 1; 21 S. Ct. 743, 45 L. Ed. 1041; *Puerto Rico v. Shell Co.*, 302 U. S. 253, 58 S. Ct. 167, 82 L. Ed. 235; *Maxwell on Interpretation of Statutes*, 6th Ed., pp. 144-145."

³³*Securities Exchange Commission v. United States Realty and Improvement Co.*, 310 U. S. 434, 445, was a civil Bankruptcy case. Literal interpretation of Chapter XI of the Bankruptcy Act would have permitted a corporation with securities publicly held to file under Chapter XI. The Solicitor General there correctly stating the principle of statutory interpretation, said "Although literal construction of the definition provisions of the Act would permit a publicly held corporation to file under Chapter XI, the structure of the Act as a whole, as well as its legislative history, shows unmistakably that such literal construction does not reflect the meaning of Congress. The rule is firmly established that the real purpose and intent of the legislative body must prevail over the literal import of the words used" (310 U. S., at p. 437).

³⁴If the expired passport were willfully used for the passport purposes, this would be an offense within the provision of §§3 and 4 of Title IX.

Within limits this is true. A Statute punishing the committing of a crime with the use of a deadly weapon probably includes one committed with a weapon that was not known at the time the Statute was passed, but the principle does not apply and has never applied so as to comprehend matters not within the principle and purview on which the statutes were originally framed and their words chosen. *Commonwealth v. Welosky*, 276 Mass. 398, 401, 402.³⁵ The authorities cited by the court do not in any way impugn this principle. The *De Lima* and *Puerto Rico* cases are [redacted] cases holding that a statutory reference to territories would be extended to cover a region that subsequently became a territory of the United States. The statement of Mr. Maxwell that an act dealing with a genus would be extended in its application to a later species of that genus cites cases such as the new kind of weapon case, but it in no sense affects the distinction stated in the *Welosky* and other cases and simply expressed in *State of Missouri v. Missouri Pacific Railway Co.*, 71 Mo. App. 385. The question there was whether a bicycle was baggage. The court said at page 393:

"While the terms in question are flexible and may include the new uses, falling within the legitimate scope of their meaning, which arise in the growth of society,

³⁵"Statutes are to be interpreted, not alone according to their simple, literal or strict verbal meaning, but in connection with their development, their progression through the legislative body, the history of the times, prior legislation, contemporary customs and conditions and the system of positive law of which they are part, and in the light of the Constitution and of the common law, to the end that they may be held to cover the subjects presumably within the vision of the legislature and, on the one hand, be not unduly constricted so as to exclude matters fairly within their scope, and, on the other hand, be not stretched by enlargement of signification to comprehend matters not within the principle and purview on which they were founded when originally framed and their words chosen. General expressions may be restrained by relevant circumstances showing a legislative intent that they be narrowed and used in a particular sense".

we are not warranted in giving them a new meaning so as to cover different subjects not within the principle upon which they are founded. To do this would be judicial legislation".

The indictment falls because as a matter of law, the exhibiting of the passports to the immigration inspectors in 1937 and 1938 was not a willful use of a passport within the meaning of Title IX. The motion for a direction on this ground (R. 226-7) should have been granted.

SECOND° POINT

There was no evidence of willfulness or of any evil use or purpose.

There was no evidence that the presentation of the passport in 1937 and 1938 involved any evil use or purpose. The United States Attorney, lacking such evidence, attempted to establish bad faith by stressing prior episodes,—a method that served improperly to prejudice the jury. The court proceeding from a different, but equally erroneous angle, in effect ruled the question of willfulness out of the case by charging in substance that all that was necessary to show willfulness was an intentional use of the document.

1. In 1934 petitioner applied for a passport in his own name. In that application he made the representation "None" in response to the question concerning the "last" passport (R. 305). At the time the Richards passport was still outstanding³⁶. Petitioner's application for renewal of his 1934 passport contained no misrepresentation. It truthfully set forth that petitioner was an American citizen. The representation "None" was not repeated. On the contrary, the "last"—the 1934—passport was presented for stamping. The renewal application contained no reference to the original application (R. 33). At the time of the renewal application and at the time of the "use" in 1937 and 1938 there were no unexpired passports outstanding.

Had petitioner in 1937 instead of applying for a renewal, asked for a new passport, his application would have stated nothing materially different from the renewal application.³⁷ The sole difference of substance would have

³⁶The prosecuting attorney stated that the question in the application was designed, among other things, "to see to it that nobody has two passports of the United States in his possession * * *" (R. 274), and in two other places in his summation the prosecutor stresses the possession of more than one passport (R. 271, 277).

³⁷Passport Application, form for native citizen, edition of 1937.

been that instead of presenting his "last" passport for *renewal* he would have presented it for *cancellation*. Had he received a new passport no one could have contended that the new passport had been obtained by a false statement. Petitioner moved for a direction on the ground that there was no false statement in the renewal application. This motion was denied by the court (R: 228-229) and the defendant excepted (R. 236). The motion should have been granted.

If there is a distinction between a new passport and a renewal passport it is on this slender reed that the case rests—there could not be an indictable use unless there was a passport obtained by a misrepresentation.

The use then for which petitioner was indicted, is the use of a paper to prove his citizenship,—a paper that contained no misstatement but that was procured by a collateral representation—once removed—which if false had nothing to do with his citizenship.

Of willful or dishonest use of the passport itself there was no evidence and because of the nature of the case there could not well have been any evidence. Such evidence as there was negates the idea of willfulness.

The evidence is that the passport was presented to the immigration inspectors. The best that any witness did in the way of positive recollection about the facts at the time of presentation was that Inspector German was "able to state" that Browder presented the passport (R. 27).

There was nothing covert in the presentation. Although the record does not disclose what happened at the time of petitioner's arrival in 1937, the immigration inspector German knew in 1938 that petitioner was coming "because of conversations with newspaper men on the trip down the bay" because "there were people down there to welcome him" (R. 128). The customs inspector knew too "there was quite a furor engendered by Mr. Browder's arrival. There was a number of press photographers there and a number of reporters" (R. 129). There is no evidence from which it may be inferred that petitioner believed or had

any reason to believe that there was anything wrong or could be anything wrong in a citizen presenting correct proof of his identity to the immigration inspectors.³⁸

If petitioner could for a moment have thought that the mere presentation of the passport to establish a fact was for some technical or constructive reason criminal, why should he not have called one of the people on the dock to identify him. With so well known a figure identification would have been a matter of no difficulty. Miss Hayes, the clerk of the Passport Agency, when she initialed the passport knew who Mr. Browder was. "I know that he is a popular man and about his activity in life." As soon as I seen Mr. Browder I recognized it was Earl Browder from reading the papers about the party he was connected with" (R. 94). Where from these transactions is there any possibility of inferring the dishonest or evil intent that is the *sine qua non* of willfulness?

2. Petitioner did not deny that the "last" passport had been obtained under the name of Richards.³⁹ Petitioner's

³⁸In *People v. Clark*, 242 N. Y. 313, at p. 329, Lehman, J., writing for a unanimous court, reversed a conviction of a public officer indicted for receiving an emolument other than as authorized by law, saying that the crime was not committed, "unless the money is received with wrongful intent. That intent is shown when it appears that the public officer has received something which he knows that the law does not permit him to accept". He refused to construe the statute so that the jury may convict "where in fact there has been no corrupt or criminal intent and no intention to injure others or to do the prohibited act and no understanding that the defendant was receiving more than he legally might".

³⁹"We do not deny that in 1931 a passport was issued to him in the name of Albert Henry Richards. We do not deny that he used that passport. It is in evidence that he is an official of the Communist party, and it is in evidence here that he went abroad from time to time. Now, it is perfectly obvious, and I don't think we need any proof to show, that a member or an officer of the Communist Party in going abroad, going through those troubled countries in Eastern Europe, might very well meet difficulties if he was traveling under his own name. A man known to be the secretary of the Communist Party might have all sorts of difficulties put in his way, and that affords a very sensible reason for a man not wanting to travel under his own name" (R. 51).

This statement made by petitioner's trial counsel was quoted in full by the prosecutor in his summation (R. 267).

attorney attempted to limit the evidence to the last passport (R. 7-15, 133, 137, 151, 225-6, 230-1). The court ultimately ruled that it would be sufficient to establish falsity of the representation "None" if the prosecution proved that a single one of the non-Browder passports had been obtained by petitioner (R. 293). Nevertheless he refused to limit the evidence to the last passport (R. 15, 133, 137, 151, 226, 232). This refusal permitted the United States Attorney to parade before the jury *in extenso*, all the earlier episodes, some of which went back to 1921.

2 The prejudicial character of such evidence, its tendency to bring about convictions for offenses for which the defendant was not indicted, casts heavy responsibilities upon the prosecuting attorney.⁴⁰ How those responsibilities were borne can be fully appreciated only by a reading of the complete summation (R. 263-277). But the following references give some idea.

The prosecutor's summation occupies 14 pages of the record. On 11 of those pages he refers to the Dozenberg, Morris and Richards episodes.

The United States Attorney refers to petitioner's "bringing disgrace on his country for so selfishly and fraudulently misusing its credentials" (R. 268). He admonishes the jury, "Now I say to you that those are the questions you must decide; whether the committing of these acts and the *presentation of that bulk of false and fraudulent material* means anything in this country of ours" (R. 273). There was no evidence of any fraudulent use and no evidence of the presentation to the inspectors of any false and fraudulent material.

The fact that many friends met petitioner on his return in 1938 and that there could have been neither doubt as to his identification nor any suggestion of the covertness

⁴⁰See *Berger v. U. S.*, 295 U. S. 78, 88; *Report to the National Commission on Law Observance and Enforcement* on "Unfairness in Prosecutions", p. 286.

or secrecy which accompany criminal acts, is thus treated by the United States Attorney:

"I waited eagerly and impatiently to hear of the popping of flashlights from photographers' bulbs on the occasion when he came in as Nicholas Dozenberg and when he came in as Morris, and when he came in as Richards, but I waited, and you waited, and we all waited in vain for a single mention of the circumstances surrounding his arrival in our country on any of those occasions" (R. 273).

The language though colorful and prejudicial, is hardly relevant to the entry in 1938.

The prosecutor ended his summation on this note:

"We can't leave the situation to some foreign official, on looking at an American passport and seeing the name Browder, to say, 'Now, are you really Browder or are you Dozenberg, Morris or Richards?' And for Browder to say, 'Oh, I made a mistake; I handed you the Browder passport. Just give it back; I will give you the Richards'" (R. 277).

The conclusion of the prosecution on this note was inexcusably unfair. The statement was utterly immaterial to the issues of the case and could have been justified only by the desire to focus the attention of the jury on the earlier episodes. The statement could have no bearing upon the 1937 and 1938 use of the renewal passport. There was only one passport then in existence. That passport correctly set forth the citizenship of the petitioner. That passport was not being used in foreign relations. The complete irrelevancy of the argument emphasizes the lengths to which the prosecuting attorney went to parade before the jury past episodes for which petitioner was

not on trial.⁴¹ Analysis fails to disclose how any of those matters could have had any relation to the intent with which he presented his passport to the inspectors at the pier.⁴²

The fact that petitioner was an official of the Communist Party was before the jury. The reading of the summation makes one inquire whether legal processes were not abused for political purposes; whether technicalities were not seized upon as an excuse for removing from society a man whose social tenets were unpopular?

3. The court charged: "The words 'willfully and knowingly' mean deliberately and with knowledge, and not something which is merely careless or negligent or inadvertent" (R. 292-293). He had theretofore denied a motion to dismiss the indictment on the ground that "the government's case is fatally defective in that it lacks the main essential ingredient of the entire case; namely, the criminal intent of the defendant at the time of the alleged act"; that there is "no proof that there was a knowing and willful use to gain entry" (R. 228).⁴³

In effect the court charged the jury that they must convict. The court had charged that it was not necessary for

⁴¹As was said in *State v. Willson*, 113 Ore. 450, 498, 230 Pac. 810, 39 A. L. R. 84, "the evidence of other offenses in this case only tend to blacken the character of the defendant. * * * No defendant ought to be deprived of his liberty by hue and cry or by the mob-mad yell of 'Crucify him' but only upon an indictment constitutionally framed and proven by evidence of criminal acts, a connection between which must have existed in the mind of the actor linking them together for some purpose he intended to accomplish".

In *Royd v. United States*, 142 U. S. 450, Harlan, J., stated that whatever may have been the character of the defendants, "however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence and only for the offense charged".

⁴²The Solicitor General relied too on the prior episodes: He refers to the repeated applications for passports under an assumed name. The repeated falsifications as to the issuance of prior passports, he says, "constitute a course of conduct which preclude any bona-fide use of the passport obtained through the concealment of these offenses". (Government's Brief in Opposition to Certiorari, pp. 12-13.)

⁴³The petitioner restated this ground for dismissal of the indictment in several different ways (R. 284, 285, 286-7).

the Government to show that "all three of these earlier passports (Dozenberg, Morris and Richards) were obtained by defendant in order to establish the falsity of the statement 'None' " (R. 293). He added that "satisfactory proof as to one of them would be sufficient for that purpose". The defendant did not dispute that a passport had been issued to him under the name of Richards (R. 51). The charge of the court taken in connection with the admission of the defendant established a passport secured by reason of a false statement. Since the court charged in effect that the passport was thus tainted and that any knowing use was a willful use, the conviction by the jury followed automatically.

4. As we have seen the court was in error as to its conception of "willfulness". *United States v. Murdock*, 290 U. S. 389 (and see *supra*, pp. 11-12).

Murdock had been indicted "for willfully failing to * * * supply * * * information demanded of a taxpayer". He "refused to disclose the name of the payee" of sums "deducted by" Murdock in making out his income tax return. The trial court in effect had charged the jury that the government had proved the defendant was guilty. This court affirmed a reversal of the conviction, holding (p. 394) that the conviction could not be supported since it proceeded upon the basis that the word "willful" used in the section upon which the indictment was found means no more than voluntary.⁴⁴

5. The Circuit Court of Appeals held that "on the evidence it was for the jury to say whether the appellant's

⁴⁴The charges of the trial court in the two cases were surprisingly similar. "You will observe", the judge told the Murdock jury (Murdock rec. 48), "that the offense charged here is the willful failure or refusal to furnish information. That means, gentlemen of the jury, that having an opportunity to do so he *deliberately* designed not to furnish the information."

"The words 'willfully and knowingly' as employed in the statute", Judge Cox instructed the Browder jury (R. 292-293), "mean *deliberately* and with knowledge and not something which is merely careless or negligent or inadvertent".

use of the passport was a willful and knowing use". It expressed no opinion on the correctness of the charge of the trial court but thought that it could not be condemned for "not being more specific" (R. 403) when no exceptions raising the point were taken.

The court below erred in two respects: (1) There was no evidence for the jury and accordingly the motions to dismiss and for a direction (R. 226-9, 233-4, 235, 236) should have been granted. (2) Even had there been evidence to go to the jury the judgment should be reversed because the summation of the United States Attorney and the trial court's somewhat different misconceptions of the law undoubtedly caused a fundamental confusion in the minds of the jurors as to the specific charge for which the petitioner was then being tried. Absence of an exception may be disregarded here as under similar circumstances it was disregarded in the Murdock case.

For plain and fundamental error has resulted in petitioner's being convicted as a felon and given a heavy prison sentence. It must be corrected, where the conviction rests upon a wholly erroneous theory and upon evidence of acts which occurred years before and which if crimes have long been barred by the Statute of Limitations.

The judgment should be reversed and the indictment dismissed.

Respectfully submitted,

CARL S. STERN

Counsel for Petitioner

CARL S. STERN

CAROL KING

BENJAMIN GOLDRING

Of Counsel

[PUBLIC—No. 24—65TH CONGRESS.]

[Extract.]

[H. R. 291.]

AN ACT To punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes.

TITLE IX

PASSPORTS

SECTION 1. Before a passport is issued to any person by or under authority of the United States such person shall subscribe to and submit a written application duly verified by his oath before a person authorized and empowered to administer oaths, which said application shall contain a true recital of each and every matter of fact which may be required by law or by any rules authorized by law to be stated as a prerequisite to the issuance of any such passport. Clerks of United States courts, agents of the Department of State, or other Federal officials authorized, or who may be authorized, to take passport applications and administer oaths thereon, shall collect, for all services in connection therewith, a fee of \$1, and no more, in lieu of all fees prescribed by any statute of the United States, whether the application is executed singly, in duplicate, or in triplicate.

Application requirements.

Fee limited.

Punishment for
false statements
in applications.

Using, passports
so obtained.

Illegally using
passport of
another.

Violating
restrictions.

Delivery to
unauthorized
person.

Punishment for
counterfeiting,
forging, etc.,
passports.

SEC. 2. Whoever shall willfully and knowingly make any false statement in an application for passport with intent to induce or secure the issuance of a passport under the authority of the United States, either for his own use or the use of another, contrary to the laws regulating the issuance of passports or the rules prescribed pursuant to such laws, or whoever shall willfully and knowingly use or attempt to use, or furnish to another for use, any passport the issue of which was secured in any way by reason of any false statement, shall be fined not more than \$2,000 or imprisoned not more than five years or both.

SEC. 3. Whoever shall willfully and knowingly use, or attempt to use, any passport issued or designed for the use of another than himself, or whoever shall willfully and knowingly use or attempt to use any passport in violation of the conditions or restrictions therein contained, or of the rules prescribed pursuant to the laws regulating the issuance of passports, which said rules shall be printed on the passport; or whoever shall willfully and knowingly furnish, dispose of, or deliver a passport to any person, for use by another than the person for whose use it was originally issued and designed, shall be fined not more than \$2,000 or imprisoned not more than five years, or both.

SEC. 4. Whoever shall falsely make, forge, counterfeit, mutilate, or alter, or cause or procure to be falsely made,

forged, counterfeited, mutilated, or altered any passport or instrument purporting to be a passport, with intent to use the same, or with intent that the same may be used by another; or whoever shall willfully or knowingly use, or attempt to use, or furnish to another for use any such false, forged, counterfeited, mutilated, or altered passport or instrument purporting to be a passport, or any passport validly issued which has become void by the occurrence of any condition therein prescribed invalidating the same, shall be fined not more than \$2,000 or imprisoned not more than five years, or both.

Using forged,
etc., passports.

Void passports.

Approved, June 15, 1917.

[22 U. S. C. §§213, 220-222. Title 22 of the U. S. C. is entitled: Foreign Relations and Intercourse.]

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Supreme Court of the United States

OCTOBER TERM, 1940

No. 287

EARL RUSSELL BROWDER

Petitioner

against

UNITED STATES OF AMERICA

APPENDIX TO BRIEF FOR PETITIONER

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APPENDIX.

	PAGE
Act of March 2, 1907, §1	1
Presidential Rules Governing Granting and Issuing of Passports in the United States—Issued January 24, 1917	2
General Instruction Consular 77—November 8, 1911	3
State Department Rules of June 1, 1915	5
Act of June 15, 1917—Title IX of Espionage Act, the Chapter Relating to Passports—22 U. S. C. §§213, 220-222	6
Attorney General	
Annual Report 1915, Extracts from	9
Recommendations by, for Legislation Amending the Criminal and other Laws of the United States with Reference to Neutrality and Foreign Relations (June, 1916) ..	10
Annual Report 1916, Extracts from	13
Annual Report 1917, Extracts from	16
State Department Circular Instruction of March 26, 1923—General Instruction. Consular, No. 885	19
Presidential Rules Governing the Granting and Issuing of Passports in the United States, Issued March 31, 1938	21
House Report No. 30, 65th Congress, 1st Session, to Accompany H. R. 291 (Act of June 15, 1917) ..	22
Congressional Record, 64th Cong., 2nd Sess., Senate—Feb. 16, 1917, pp. 3412-3	27

	PAGE
Act of May 22, 1918—22 U. S. C. §§223-226	32
Act of November 10, 1919	35
House Report No. 382, 66th Cong., 1st Sess., to accompany H. R. 9782, Act of November 10, 1919	38
Act of March 2, 1921, 22 U. S. C. §227	41
Act of May 16, 1932, 22 U. S. C. §217a	42
Miscellaneous	
Letter of Secretary of State, William J. Bryan, dated January 20, 1915, to William J. Stone, Chairman of the Senate Committee on For- eign Relations, excerpts from	43
United States Committee on Public Information, German Plots and Intrigues in the United States During the Period of Our Neutrality, July, 1918	45

The following abbreviated citation is employed:

Compilation.....Compilation of certain departmental
circulars relating to citizenship, reg-
istration of American citizens, issu-
ance of passports, etc. (1925), Dep't
of State.

APPENDIX TO BRIEF FOR PETITIONER.

AN ACT In reference to the expatriation of citizens
and their protection abroad.

[Public—No. 193—59th Congress; Act of March 2, 1907
(34 Stat. L., 1228).]

SECTION 1. That the Secretary of State shall be authorized, in his discretion, to issue passports to persons not citizens of the United States as follows: Where any person has made a declaration of intention to become such a citizen as provided by law and has resided in the United States for three years a passport may be issued to him entitling him to the protection of the Government in any foreign country: *Provided*, That such passport shall not be valid for more than six months and shall not be renewed, and that such passport shall not entitle the holder to the protection of this Government in the country of which he was a citizen prior to making such declaration of intention.*

*This section was repealed by § 5 of the Act of June 4, 1920 (H. R. 11960).

*Rules Governing the Granting and Issuing of Passports
in the United States*

Issued January 24, 1917.

Passports issued by the Department of State or its diplomatic or consular representatives are intended for identification and protection in foreign countries, and not to facilitate entry into the United States,* immigration being under the supervision of the Department of Labor.**

WOODROW WILSON

The White House,
24 January, 1917.

*See Departmental Circular Instruction and Regulations to same effect, *infra*, pp. 4, 5.

**This provision is likewise contained in the Presidential rules of:

June 7, 1911, rule 4, par. 3;
Nov. 13, 1914, rule 4, par. 3;
Jan. 12, 1915, rule 5, par. 3;
Dec. 17, 1915, rule 6, par. 2;
Apr. 17, 1916, rule 6, par. 2.

[No. 77. General instruction. Consular]

EXPATRIATION

RULE (D) UNDER WHICH THE PRESUMPTION ARISING UNDER SECTION 2 OF THE ACT OF MARCH 2, 1907, MAY BE OVERCOME

The Secretary of State to the American diplomatic and consular officers (including consular agents)

DEPARTMENT OF STATE,
Washington, November 18, 1911.

Gentlemen: In view of the decision of the Attorney General communicated to you in the circular instruction of December 22, 1910, entitled "Expatriation," the following rule (d) is adopted as supplementary to rules (a), (b), and (c) prescribed in circular instruction of April 19, 1907, whereunder the presumption of expatriation arising against a naturalized citizen under the provision of the second paragraph of section 2 of the act of March 2, 1907,* may be overcome, namely, by his presenting to a diplomatic or consular officer proof establishing the following fact:

*Section 2 reads as follows:

"Section 2. That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state.

When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided, however,* That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: And *Provided, also,* That no American citizen shall be allowed to expatriate himself when this country is at war."

(d) That he has made definite arrangements to return immediately to the United States for permanent residence.

When a naturalized citizen against whom the presumption has arisen has failed previously to present evidence sufficient under rules (a), (b), and (c) to overcome it, but applies to a diplomatic or consular officer for a passport such officer should require positive evidence of some kind, besides the man's bare allegation, first, that he intends to return forthwith to this country and has actually made his arrangements to do so, and, second, that his intended return is for permanent residence, and not merely for a temporary visit. In this connection the disposition of his property and effects, the arrangements in regard to his family, if he has one, and the steps taken to obtain passage to the United States are to be considered, and, whenever practicable, the exhibition of the applicant's steamship ticket should be required.

Under the circumstances mentioned a passport may be issued to the person concerned by a diplomatic officer or consular officer authorized to issue emergency passports, if he needs it to enable him to leave the country in which he has been residing or to pass on his way to the United States through a country in which passports are required. A passport should not be issued merely to facilitate entry into the United States.

An emergency passport issued under the conditions mentioned should be limited to a period sufficient to cover the date of embarkation or period of passage and should incite upon its face the object for which it is issued.

I am, etc.,

P. C. KNOX.

[Compilation, pp. 35-36]

Rules of June 1, 1915, governing the granting and issuing of passports to those who have declared their intention to become citizens of the United States*

A passport may be granted to a declarant under the statutory provision quoted above for purposes of identification, and protection in foreign countries; other than his country of origin, but not for the purpose of facilitating reentry into this country. All matters relating to immigration being under the supervision of the Department of Labor, any inquiries concerning the right to reenter the United States should be addressed to that Department.

W. J. BRYAN.

DEPARTMENT OF STATE,

Washington, June 1, 1915.

[For. Rels., 1915 Supp., pp. 906-8]

*Unnumbered Departmental order. Passports are not issued to declarants who are natives of countries which are at war, nor to declarants who intend to visit belligerent countries.

*Title IX of Espionage Act, the Chapter
Relating to Passports.**

AN ACT To punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes.

[Public—No. 24—65th Congress;
H. R. 291.]

TITLE IX

PASSPORTS

Application
requirements.

SECTION 1.¹ Before a passport is issued to any person by or under authority of the United States such person shall subscribe to and submit a written application duly verified by his oath before a person authorized and empowered to administer oaths, which said application shall contain a true recital of each and every matter of fact which may be required by law or by any rules authorized by law to be stated as a prerequisite to the issuance

*The Act included twelve other titles: Title I, Espionage; Title II, Vessels in Ports of the United States; Title III, Injuring Vessels Engaged in Foreign Commerce; Title IV, Interference with Foreign Commerce by Violent Means; Title V, Enforcement of Neutrality; Title VI, Seizure of Arms and other Articles Intended for Export; Title VII, Certain Exports in Time of War Unlawful; Title VIII, Disturbance of Foreign Relations; Title X, Counterfeiting Government Seal; Title XI, Search Warrants; Title XII, Use of Mails; Title XIII, General Provisions.

¹Changes from the wording in the original bill, H. R. 291, introduced in August, 1936, are indicated in the numbered footnotes. Each of the sections in the original bill was preceded by the word "That".

of any such passport. / Clerks of United States courts, agents of the Department of State, or other Federal officials authorized, or who may be authorized, to take passport applications and administer oaths thereon, shall collect, for all services in connection therewith, a fee of \$1, and no more, in lieu of all fees prescribed by any statute of the United States, whether the application is executed singly, in duplicate, or in triplicate.²

Fee limited.

SEC. 2. Whoever shall willfully and knowingly make any false statement in an application for passport³ with intent to induce or secure the issuance⁴ of a passport under the authority of the United States, either for his own use or the use of another, contrary to the laws regulating the issuance of passports or the rules prescribed pursuant to such laws, or who ever shall willfully and knowingly use or attempt to use, or furnish to another for use, any passport the issue of which was secured in any way by reason of any false statement, shall be fined not more than \$2,000 or imprisoned not more than five years or both.

Punishment for false statements in applications.

Using, passports so obtained.

SEC. 3. Whoever shall willfully and knowingly use, or attempt to use, any passport issued or designed for the use of another than himself, or whoever shall willfully and knowingly use or attempt to use any passport in violation of the conditions or restrictions therein contained,

Illegally using passport of another.

Violating restrictions.

²This sentence did not appear.

³The additional words "or otherwise" appeared here.

⁴This word was "issue".

**Delivery to
unauthorized
person.**

**Punishment for
counterfeiting,
forging, etc.,
passports.**

**Using forged,
etc., passports.**

Void passports.

or of the rules prescribed pursuant to the laws regulating the issuance of passports, which said rules shall be printed on the passport⁵; or whoever shall willfully and knowingly furnish, dispose of, or deliver a passport to any person, for use by another than the person for whose use it was originally issued and designed, shall be fined not more than \$2,000 or imprisoned not more than five years, or both.

SEC. 4. Whoever shall falsely make, forge, counterfeit, mutilate, or alter, or cause or procure to be falsely made, forged, counterfeited, mutilated, or altered any passport or instrument purporting to be a passport, with intent to use the same, or with intent that the same may be used by another; or whoever shall willfully or knowingly use, or attempt to use, or furnish to another for use any such false, forged, counterfeited, mutilated, or altered passport or instrument purporting to be a passport, or any passport validly issued which has become void by the occurrence of any condition therein prescribed invalidating the same, shall be fined not more than⁷ \$2,000 or imprisoned not more than five years, or both.

Approved, June 15, 1917.

[22 U. S. C. §§213, 220-222. Title 22 of the U. S. C. is entitled: Foreign Relations and Intercourse.]

⁵This provision for printing the rules did not appear, i. e., the phrase after the word "passports," to the semi-colon.

⁶This word was "and".

⁷The two words "more than" were the one word "exceeding."

Extracts from Annual Report of Attorney General, 1915

ENFORCEMENT OF NEUTRALITY.

During the last half of the previous fiscal year and the first three or four months of the fiscal year 1915 the work of enforcing neutrality was less than for a number of years, but because of conditions growing out of the European war and troubles on the Mexican border, work of this character thereafter steadily increased, until in the month of June, 1915, it had grown beyond that of any previous month, and it is still increasing.

Among the more important cases instituted are the following:

2. *United States v. Hans Adam Wedel, Carl Ruroede and others*, in which the defendants were indicted for conspiracy to defraud the United States through obtaining passports for the use of German reservists. Von Wedel is a fugitive, Ruroede is serving a sentence of three years' imprisonment, and four others paid fines of \$300 each.

3. *United States v. Richard B. Stoegler, Richard Madden, and Gustave Cook*, in which the men named were indicted for conspiracy to defraud the United States through the procuring for Stoegler's use as a German agent a passport in the name of Madden. Stoegler was sentenced to 60 days' imprisonment and Madden and Cook to 10 months each.

RECOMMENDATIONS BY THE ATTORNEY GENERAL

For

LEGISLATION AMENDING THE CRIMINAL AND OTHER LAWS OF
THE UNITED STATES WITH REFERENCE TO NEUTRALITY
AND FOREIGN RELATIONS

To the—

*Chairman of the Committee on Foreign Relations of
the Senate.**Chairman of the Committee on the Judiciary of the
Senate.**Chairman of the Committee on Foreign Affairs of the
House of Representatives.**Chairman of the Committee on the Judiciary of the
House of Representatives.*

The following recommendations for new legislation are made as a result of the experience of the Department of Justice and of the State Department during the past three years in the administration of law in connection with the relations of this country with Mexico and with the problems arising out of the European war.

Many acts committed in the United States in serious violation of its sovereignty and against its peace and the safety of its citizens are not now punishable by any Federal criminal law; others are punishable only under unsatisfactory statutes passed in relation to conditions altogether different from those now prevailing.

The present laws relating to neutrality are clearly defective. In some cases, no statutory provision whatever is made for the observance of obligations imperatively imposed by international law upon the United States; in other cases, inadequate provision is made.

In my opinion, the passage of the new legislation herewith submitted is required for the protection of the United

States and its citizens and for the fulfillment of the duty owed by the United States to other nations with which it is at peace.

The general recommendations set forth in this memorandum have been submitted to the State Department and have been concurred in by the Secretary of State and by the Joint State and Navy Neutrality Board. I am submitting herewith drafts of proposed bills to carry out these recommendations.

T. W. GREGORY,
Attorney General.

V.

(a) An Act requiring applications for passports to be under oath, and authorizing the Secretary of State by regulation to require proof by affidavit of such facts as he may deem desirable, and making false statements in any such application or affidavit, perjury;

(b) An Act making criminal the fraudulent obtaining, transfer, or use of passports, and the alteration or forgery of passports issued.

NOTE.—(a) It is desirable that there should be further specific legislation relative to oaths and perjury in passport applications. Heretofore, oaths have been required under the general authority of the President to prescribe rules given in the Act of June 14, 1902, and under the recognition of the possibility of such oaths in Revised Statutes, section 212. See also Revised Statutes, section 4075.

A question has been raised whether a false statement in oaths so required constitutes perjury within the purview of Penal Code, section 125.

(b) There should be punishment for the person who fraudulently obtains or fraudulently uses a passport.

VI.

An Act making criminal the fraudulent use, or application, or counterfeiting of the seal of any Executive Department or Government commission.

NOTE.—The seal of the State Department has been misused in connection with passport frauds.

[Recommendation, pp. 3, 17.]

Extracts from Annual Report of Attorney General, 1916

I also submit the following additional recommendations:

1. **CHANGES IN LAWS AFFECTING NEUTRALITY AND FOREIGN RELATIONS.**

From the experience of this department and of the State Department during the past three years in the administration of law in connection with the relations of this country with Mexico and with the problems arising out of the European war, it has become clear that there is urgent need of a revision of the statute law bearing on our international relations.

Many acts committed in the United States in serious violation of its sovereignty and against its peace and the safety of its citizens are not now punishable by any Federal criminal law; others are punishable only under unsatisfactory statutes passed in relation to conditions altogether different from those now prevailing.

The present laws relating to neutrality are clearly defective. In some cases no statutory provision whatever is made for the observance of obligations imperatively imposed by international law upon the United States; in other cases inadequate provision is made.

In my opinion, the passage of the following new legislation is required for the protection of the United States and its citizens and for the fulfillment of the duty owed by the United States to other nations with which it is at peace.

The general recommendations now made have been submitted to the State Department and have been concurred in by the Secretary of State and by the Joint State and Navy Neutrality Board. On June 3, 1916, I addressed letters to the chairman of the following congressional committees: Committee on Foreign Relations of the Senate, Committee on the Judiciary of the Senate, Committee on Foreign Affairs of the House of Representatives, Commit-

tee on the Judiciary of the House of Representatives, transmitting a printed memorandum of these recommendations, accompanied by drafts of proposed bills to carry them out. I can not too strongly urge the immediate enactment of these bills (pp. 12-13).*

ENFORCEMENT OF NEUTRALITY.

During the past year (as in the previous year and since August, 1914), the regular work of the department has been tremendously augmented by the legal problems connected with the European war. Many of the questions presented in the prosecutions initiated and in opinions rendered to other departments of the Government have been without precedent. The labors of the special agents of the Bureau of Investigation have been very great and country-wide in investigating reported breaches of our neutrality and other criminal laws arising out of war conditions. Careful daily scrutiny of agents' reports has been necessary in order that prompt measures might be taken to prosecute such violations of Federal law. Many of the actions investigated, however, have been found to constitute violations of State rather than Federal laws. The inadequacy of our Federal criminal laws relative to neutrality and foreign relations and the necessity for their complete revision have been clearly proved.

Since the beginning of the European war, over 30 indictments have been found in various parts of the country, and upward of 110 persons have been indicted. Within the past year, 15 indictments, involving 84 persons and corporations, were returned and 21 persons and corpora-

*This Report (pp. 16-17) incorporates verbatim the recommendations of the Attorney General which appear *supra* pp. 11-12 and which were forwarded in June to the House and Senate Committees on Judiciary and Foreign Relations with H. R. 291 and S. 6797. This Report was dated December 4, 1916.

tions were convicted. Most of the plots against our laws were so carefully laid as to render it extremely difficult to obtain evidence. There has at no time, however, been any relaxation in the effort to enforce the law rigorously and impartially and regardless of the nationality of the persons involved.

Among the more important cases are the following:

• • • • •
11. *United States v. Harry Max Zelinka and others.*—Zelinka plead guilty to a charge of conspiracy to defraud the United States in the securing of an American passport, he being an Austrian citizen. He was sentenced to pay a fine of \$200 and to imprisonment for one week.

• • • • •
13. *United States v. Franz Rintelin and Andrew D. Meloy.*—In this case the defendants are under indictment for conspiracy to defraud the United States because of efforts made to obtain an American passport for the former, who is a German naval officer, who was in this country on a secret mission.

• • • • •
[1916 Report, pp. 12, 13, 52-54]

*Extracts from Annual Report of Attorney General, 1917*4. PUNISHMENT FOR VIOLATION OF PRESIDENT'S
PROCLAMATION.

Legislation should be enacted defining as a criminal offense a willful violation of the presidential proclamations relating to alien enemies promulgated under section 4067 of the Revised Statutes and providing appropriate punishment.

5. REGULATION OF ENTRY AND DEPARTURE OF PERSONS
FROM UNITED STATES

I recommend the passage of a law conferring on the President power to regulate or provide for the regulation of the entry and departure of all persons, both citizens and aliens, to and from the United States and its possessions during a state of war (p. 16).

WAR ACTIVITIES.

1. NEUTRALITY AND OTHER CRIMINAL CASES CONNECTED
WITH THE EUROPEAN WAR.

Vigorous prosecution has been made of all cases involving violations of our neutrality and German criminal activities in this country in connection with the European war. In every such case tried, the Government has secured a conviction of at least some of the defendants. This should serve to discourage attempts of foreign sympathizers to use this country as a base for illegal operations designed to attack another country with which the United States is at peace.

Among the more important cases were the following (p. 50):

16. *United States v. Franz von Rintelen and Andrew D. Meloy*.—In this case the defendants are under indictment in New York for conspiracy to defraud the United States in connection with use by Rintelen, a German agent, of false passports in leaving this country. The case is pending.

17. *United States v. Franz Rintelen*.—Two further indictments are pending in New York for perjury and forgery in connection with defendant's false passport (p. 52).

In order to make the showing more complete it may be stated that the following convictions were obtained prior to June 30, 1916, in cases arising out of the European war:

28. *United States v. Zelinka et al.*—Defendant sentenced to imprisonment for one week and to pay a fine of \$200 for conspiracy to defraud in connection with a false passport.

29. *United States v. Hans Adam von Wedel, Ruroede, et al.*—Defendant Ruroede sentenced for three years at Atlanta, and others were fined \$300 each for conspiracy to defraud in connection with false passports. Von Wedel, a German officer, became a fugitive and is supposed to have been drowned in a German submarine attack.

30. *United States v. Stoegler et al.*—Defendants Madden and Cook sentenced to 10 months and Stoegler to 60 days in jail for conspiracy to defraud in connection with false passports (p. 53).

4. WAR LEGISLATION.

During February 1917, the department was asked for advice in reference to the so-called espionage bill, which was passed by the Senate February 20. This bill was framed by combining the various bills as to foreign relations and neutral obligations of the United States, which had been recommended by the Attorney General in May, 1916, and which, with the reasons for their adoption, are set forth at length in his last annual report. To these bills was added an espionage measure. This combined statute was popularly given the title of the "Espionage act," although the espionage feature was not in reality the most important portion of the bill. After being amended, the bill passed the Senate and was reported to the House, but was not acted upon. A new draft, with changes suggested by this department,* was introduced in the Sixty-fifth Congress, and after being amended was enacted into law June 15, 1917. Its many important and sorely needed provisions will provide greater protection to the interests of the United States in times of peace, and will also enable the Federal Government in the preparation for and successful carrying on of the war . . . (p. 73).

[1917 Report, pp. 16, 50, 52, 53, 73]

*[See pp. 28-31, *infra*.]

State Department Circular Instruction of March 26, 1923.

[No. 885. General instruction. Consular. (Diplomatic
Serial No. 187)]

CANCELLATION OF EXPIRED AMERICAN PASSPORTS

DEPARTMENT OF STATE,
Washington, March 26, 1923.

To the American Diplomatic and Consular Officers.

GENTLEMEN: The second page of American passports bears the following notice:

This passport is valid for a period of twelve months and expires unless previously extended. It is subject to one or more extensions, provided the final date of expiration is not later than two years after the date of its issuance.

Section 4, Title IX of the espionage act states that—

* * * whoever shall willfully or knowingly use or attempt to use * * * any passport validly issued which has become void by the occurrence of any condition therein prescribed invalidating the same shall be fined not more than \$2,000 or imprisoned not more than five years, or both.

It is known that many naturalized American citizens, especially those of European origin, continue to use American passports long after the expiration of their maximum period of validity. A still more serious offense is the continued use of passports which have been specifically limited as to validity. For example, the department occasionally limits a passport because of conditions peculiar to the case,

or on the sworn statement of the applicant that he will return to the United States within the designated period. In cases of that class, the department intends that the protection of this Government should not be extended to the holders of the passports after the determination of their validity, unless such validity is extended by the department to some future date.

Expired departmental, insular, or emergency passports which come into your hands in the course of business, and are not susceptible of further extension, should be canceled by cutting out a part of the seal and by writing the word "canceled" in large letters across the face of the passport. The date of the cancellation and the signature and title of the canceling officer should be added after the word "canceled." The department believes that this procedure would work no hardship upon the bearer of a canceled passport, because if he is a traveler he should hold a valid passport, and if he has a fixed residence abroad, a registration certificate would usually be sufficient for his purposes.

There may occasionally come to your attention a passport which has expired under circumstances making it impossible for the holder to replace it by a valid passport. This may be true in cases of physical disability or in cases where the holder of the passport lives in a region remote from a consulate or a mission and in such cases the expired passport need not be canceled until a new passport is received or refused. However, a notation should be made on the application for a new passport showing why the expired passport was not canceled.

I am, gentlemen,

Your obedient servant,

For Secretary of State:

ALVEY A. ADEE.

*Rules Governing the Granting and Issuing of Passports in
the United States*

Issued March 31, 1938

124. The Secretary of State is authorized in his discretion to refuse to issue a passport, to restrict a passport for use only in certain countries, to restrict it against use in certain countries, to withdraw or cancel a passport already issued, and to withdraw a passport for the purpose of restricting its validity or use in certain countries.

125. Should a person to whom a passport has been issued knowingly use or attempt to use it in violation of the conditions or restrictions contained therein or of the provisions of these rules, the protection of the United States may be withdrawn from him while he continues to reside abroad.

FRANKLIN D. ROOSEVELT

The White House,
March 31, 1938.

[3 F. R. 681]

*House Report No. 30, Sixty-Fifth Congress, First Session,
to Accompany H. R. 291 (Act of June 15, 1917)**

TO PUNISH ESPIONAGE AND ENFORCE THE CRIMINAL LAWS
OF THE UNITED STATES.

April 25, 1917.—Referred to the House Calendar and
ordered to be printed.

Mr. Webb, from the Committee on the Judiciary, submitted
the following

REPORT

[To accompany H. R. 291.]

The Committee on the Judiciary, having had under consideration the bill (H. R. 291) to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes, report the same back with the recommendation that the bill be amended as follows, and that, as amended, it do pass.

Amend by striking out all after the enacting clause and insert in lieu of the language stricken out the following:

TITLE VIII.

PASSPORTS.

SEC. 800. Before a passport is issued to any person by or under authority of the United States, such person shall

*See supra, pp. 6-8.

subscribe to and submit a written application duly verified by his oath before a person authorized and empowered to administer oaths, containing a true recital of every matter of fact which may be required by law or by any rules authorized by law to be stated as a prerequisite to the issuance of any such passport. Officials authorized, or who may be authorized, to take passport applications and administer oaths thereon, shall collect, for all services in connection therewith, a fee of \$1, and no more, in lieu of all fees prescribed by any statute of the United States, whether the application is executed singly, in duplicate, or in triplicate.

SEC. 801. Whoever willfully and knowingly makes any false statement in an application for passport, with intent to induce or secure the issuance of a passport under the authority of the United States, either for his own use or the use of another, contrary to the laws regulating the issuance of passports or the rules prescribed pursuant to such laws; or whoever willfully and knowingly uses or attempts to use, or furnishes to another for use, any passport the issue of which was secured in any way by reason of any false statement, shall be fined not more than \$2,000 or imprisoned not more than five years, or both.

SEC. 802. Whoever willfully and knowingly (a) uses, or attempts to use, any passport issued or designed for the use of another than himself, or (b) uses, or attempts to use, any passport in violation of the conditions or restrictions therein contained, or of the rules prescribed pursuant to the laws regulating the issuance of passports, which said rules shall be printed on the passport; or (c) furnishes, disposes of, or delivers a passport to any person for use by another than the person for whose use it was originally issued and designed, shall be fined not more than \$5,000, or imprisoned not more than five years, or both.

SEC. 803. Whoever makes, forges, counterfeits, mutilates, or alters any passport or instrument purporting to be a passport, with intent to use it, or with intent that it may be used by another; or whoever willfully and knowingly uses, or attempts to use, or furnishes to another for use any such false, forged, counterfeited, mutilated, or altered passport or instrument purporting to be a passport, or any passport validly issued which has become void by the occurrence of any condition therein prescribed invalidating the same, shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

The general legislation contained in the amended bill is a result of the recommendations of the Department of Justice and the State Department, and these recommendations were made as a result of the experiences of these departments during the past three years in the administration of law in connection with the relations of this country with Mexico and with problems arising out of the European war.

The Attorney General, in transmitting these recommendations, says:

Many acts committed in the United States in serious violation of its sovereignty and against its peace and the safety of its citizens are not now punishable by any Federal criminal law; others are punishable only under unsatisfactory statutes passed in relation to conditions altogether different from those now prevailing. The present laws relating to neutrality are clearly defective. In some cases no statutory provision whatever is made for the observance of obligations imperatively imposed by international law upon the United States; in other cases inadequate provision is made. In my opinion the passage of the new legislation herewith submitted is required for the protection of the United States and its citizens and for the fulfillment

of the duty owed by the United States to other nations with which it is at peace.*

* For convenience of reference the committee has substituted for the word "chapter" wherever it appears in the bill the word "title". The committee, in framing the espionage title, have endeavored to avoid making innocent acts criminal and, therefore, in Title I, sections 1 and 2, the criminality of the act is made to depend upon the knowledge, intent, or reason to believe that the information obtained or transmitted concerning our national defense is to be used to the injury of the United States.

Section 3 of this title punishes an officer or trustee of our national defense secrets who wilfully communicates such secrets to a person not lawfully entitled to receive them and punishes such person if he through gross negligence permits any document, etc., to be lost or stolen, etc.

Section 4 of Title I gives the President the power, during national emergency resulting from a war to which the United States is a party, or from threat of such war, to proclaim the existence of such emergency, and thereupon by proclamation to prohibit the publishing or communicating of or the attempting to publish or communicate any information relating to national defense which, in his judgment, is of such character that it is or might be useful to the enemy.

This section in the bill has been carefully and patiently considered by the committee. The committee realize that the section as recommended gives the President broad powers, but it must be admitted by all patriotic persons anxious for the success of our arms that in times like these through which we are now going it is important that the Commander in Chief shall have authority to prevent the publication of national defense secrets, which would be useful to the enemy and, therefore, harmful to the United

*See Recommendations of the Attorney General, *supra*, pp. 10-11.

States. We feel confident that the President will not abuse this authority but will exercise it in the spirit in which it is given, by safeguarding the public welfare by preventing our vital national defense secrets from falling into the hands of the enemy. We believe that the public and the newspaper world will heartily co-operate with the President and the Congress in attaining this worthy end. The proviso in this section is hardly necessary to be written into the bill, but for the purpose of assuring the public and the newspaper fraternity that nothing in the President's proclamation shall limit or restrict discussion, comment, or criticism of the acts or policies of the Government or of its representatives the clause is inserted.

Section 5 of Title I makes it a crime for any person to willfully convey false reports or statements with the intent to interfere with the operation or success of the military and naval forces of the United States, or to promote the success of the enemy, and for anyone in time of war to willfully cause, or attempt to cause, insubordination, disloyalty, or refusal of duty in the military or naval forces. The committee feel that no patriotic American will ever attempt willfully to violate the provisions of this section.

The remaining sections of the title are self-explanatory and need not be elaborated upon in this report. The committee feel that all the remaining sections [*i. e.*, the non-espionage sections] of the amended bill are drawn with sufficient clearness to be self-explanatory, and the committee is confident that the House will realize the importance of the passage of each section of the amended bill, and therefore recommend that the bill as amended and reported herein be passed.

Congressional Record

64TH CONGRESS, 2ND SESSION.

[S. 8148 (Act of June 15, 1917)]

Pages 3412-3

Senate—February 16, 1917.

CHAPTER IV.

[S. 6797.]

To regulate and safeguard the issuance of passports, and to prevent and punish the fraudulent obtaining, transfer, use, alteration, or forgery thereof.*

SECTION 1. Before a passport is issued to any person by, or under authority of, the United States, such person shall subscribe to and submit a written application duly verified by his oath before a person authorized and empowered to administer oaths, which said application shall contain a true recital of each and every matter of fact which may be required by law or by any rules authorized by law to be stated as a prerequisite to the issuance of any such passport.

SEC. 2. Whoever shall willfully and knowingly make any false statement in an application for passport or otherwise, with intent to induce or secure the issue of a passport under the authority of the United States, either for his own use or the use of another, contrary to the laws regulating the issuance of passports or the rules prescribed pursuant to such laws; or whoever shall willfully and knowingly use, or attempt to use, or furnish to another for use any passport, the issue of

*See Recommendations of the Attorney General, *supra*, p. 11 to the same effect.

which was secured in any way by reason of any false statement, shall be fined not more than \$2,000 or imprisoned not more than five years, or both.

SEC. 3. Whoever shall willfully and knowingly use, or attempt to use, any passport issued or designed for the use of another than himself, or whoever shall willfully and knowingly use or attempt to use any passport in violation of the conditions or restrictions therein contained, or of the rules prescribed pursuant to the laws regulating the issuance of passports; or whoever shall willfully and knowingly furnish, dispose of, or deliver a passport to any person, for use by another than the person for whose use it was originally issued and designed, shall be fined not more than \$2,000 or imprisoned not more than five years, or both.

Mr. Overman Mr. President, I desire to introduce two amendments that have been suggested to that chapter, and ask to have read a letter from the Attorney General on the subject.

The amendments and letter above referred to are as follows:

1. Page 12, lines 4 and 5, strike out "a person authorized and empowered to administer oaths" and insert in lieu thereof the following: "such persons as may be designated by the President or by the Secretary of State to administer such oaths."

2. Insert, at the end of section 1 on page 12, the following:

"Clerks of United States courts, agents of the Department of State, or other Federal officials authorized

or who may be authorized to take passport applications and administer oaths thereon, shall collect for all services in connection therewith a fee of \$1, and no more, in lieu of all fees prescribed by any statute of the United States, whether the application is executed singly, in duplicate, or in triplicate."

OFFICE OF THE ATTORNEY GENERAL,
Washington, D. C., February 12, 1917.

Hon. C. A. CULBERSON,
Chairman Committee on the Judiciary,
United States Senate, Washington, D. C.

MY DEAR SENATOR: The State Department has just presented to me two minor additions which it says are very essential to the bill originally S. 6797, now chapter 4 of the committee print neutrality bill, relative to passports:

1. To amend lines 4 and 5, page 12, so as to read as follows:

"His oath before such persons as may be designated by the President or by the Secretary of State to administer such oaths, which said application shall contain a true."

2. To insert, at the end of section 1, on page 12, the following:

"Clerks of United States courts, agents of the Department of State, or other Federal officials authorized or who may be authorized to take passport applications and administer oaths thereon, shall collect for all services in connection therewith a fee of \$1, and no more, in lieu of all fees prescribed by any statute of the

United States, whether the application is executed singly, in duplicate, or in triplicate."

The object of this addition is to clear up a situation which now exists. At present clerks of courts are the officials designated by the President, through the Secretary of State, to take passport applications and administer oaths. Under the present fee system there is a great variance in the practice of these clerks of courts, and many of them, it has been found, charge fees which are quite exorbitant, but which seem to be lawful under the present statutes. The fees charged, it has been found, have varied from \$1.50 to \$6. The Chief of the Citizenship Bureau of the State Department and the Chief of the Division of Accounts in this department, both of which gentlemen have had long experience in these matters, have come to the conclusion that a fee of \$1 is ample in such cases and that larger fees are or may be an unnecessary hardship on citizens applying for passports.

This is a matter which has been presented to my attention for the first time to-day, and was not considered by me or, apparently, by the State Department when the final draft of the bill on this subject was submitted to it.

Respectfully,

T. W. GREGORY,
Attorney General.

The Secretary resumed the reading of the proposed substitute, as follows:

SEC. 4. Whoever shall falsely make, forge, counterfeit, mutilate or alter, or cause or procure to be falsely made, forged, counterfeited, mutilated, or altered any

passport or instrument purporting to be a passport, with intent to use the same, or with intent that the same may be used by another; or whoever shall willfully and knowingly use, or attempt to use, or furnish to another for use any such false, forged, counterfeited, mutilated, or altered passport or instrument purporting to be a passport, or any passport validly issued which has become void by the occurrence of any condition therein prescribed invalidating the same, shall be fined not exceeding \$2,000 or imprisoned not more than five years, or both.

AN ACT To prevent in time of war departure from or entry into the United States contrary to the public safety.

[Public—No. 154—65th Congress;
H. R. 10264.]

Foreign travel.
Acts of, made
unlawful during
time of war.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That when the United States is at war, if the President shall find that the public safety requires that restrictions and prohibitions in addition to those provided otherwise than by this Act be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or Congress, be unlawful—

Aliens violating
prescribed rules.

(a) For any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President shall prescribe;

Transporting
prohibited
persons.

(b) For any person to transport or attempt to transport from or into the United States another person with knowledge or reasonable cause to believe that the departure or entry of such other person is forbidden by this Act;

Making false
application for
permits.

(c) For any person knowingly to make any false statement in an application for permission to depart from or enter the United States with intent to induce or secure the granting of such permission either for himself or for another;

(d) For any person knowingly to furnish or attempt to furnish or assist in furnishing to another a permit or evidence of permission to depart or enter not issued and designed for such other person's use; **Furnishing false permits, etc.**

(e) For any person knowingly to use or attempt to use any permit or evidence of permission to depart or enter not issued and designed for his use; **Using permit of another person.**

(f) For any person to forge, counterfeit, mutilate, or alter, or cause or procure to be forged, counterfeited, mutilated, or altered, any permit or evidence of permission to depart from or enter the United States; **Forging, etc., permits.**

(g) For any person knowingly to use or attempt to use or furnish to another for use any false, forged, counterfeited, mutilated, or altered permit, or evidence of permission, or any permit or evidence of permission which, though originally valid, has become or been made void or invalid. **Using false, etc., permits.**

SEC. 2. That after such proclamation as is provided for by the preceding section has been made and published, and while said proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter or attempt to depart from or enter the United States unless he bears a valid passport. **Passports required for all entries and departures of citizens.**

**Punishment
for violation.**

SEC. 3. That any person who shall willfully violate any of the provisions of this Act, or of any order or proclamation of the President promulgated, or of any permit, rule, or regulation issued thereunder, shall, upon conviction, be fined not more than \$10,000, or, if a natural person, imprisoned for not more than twenty years, or both; and the officer, director, or agent of any corporation who knowingly participates in such violation shall be punished by like fine or imprisonment, or both; and any vehicle or any vessel, together with its or her appurtenances, equipment, tackle, apparel, and furniture, concerned in any such violation, shall be forfeited to the United States.

**Forfeiture
of vehicle,
vessel, etc.**

**Meaning
of terms:**

"United States."

SEC. 4. That the term "United States" as used in this Act includes the Canal Zone and all territory and waters, continental or insular, subject to the jurisdiction of the United States.

"Person."

The word "person" as used herein shall be deemed to mean any individual, partnership, association, company, or other unincorporated body of individuals, or corporation, or body politic.

Approved, May 22, 1918.

[22 U. S. C. §§223-226]

AN ACT To regulate further the entry of
aliens into the United States.

[Public—No. 79—66th Congress;
H. R. 9782.]

*Be it enacted by the Senate and House
of Representatives of the United States
of America in Congress assembled,* That
if the President shall find that the public
safety requires that restrictions and pro-
hibitions in addition to those provided
otherwise than by this Act be imposed
upon the entry of aliens into the United
States, and shall make public proclamation
thereof, it shall, until otherwise ordered
by the President or Congress, be unlaw-
ful—

Entry of aliens.

Restrictions
imposed on.

(a) For any alien to enter or attempt
to enter the United States except under
such reasonable rules, regulations, and
orders, and subject to such passport, visé,
or other limitations and exceptions as the
President shall prescribe;

Aliens violating
prescribed rules.

(b) For any person to transport or at-
tempt to transport into the United States
another person with knowledge or reason-
able cause to believe that the entry of such
other person is forbidden by this Act;

Transporting
prohibited
persons.

(c) For any person knowingly to make
any false statement in an application for
a passport or other permission to enter the
United States with intent to induce or
secure the granting of such permission,
either for himself or for another;

Making false
applications for
passports, etc.

Furnishing
viséed passport
of another
person.

(d) For any person knowingly to furnish or attempt to furnish or assist in furnishing to another a viséed passport or other permit or evidence of permission to enter, not issued and designed for such other person's use;

Using viséed
passport of
another.

(e) For any person knowingly to use or attempt to use any viséed passport or other permit or evidence of permission to enter not issued and designed for his use;

Forging, etc.,
passports.

(f) For any person to forge, counterfeit, mutilate, or alter, or cause or procure to be forged, counterfeited, mutilated, or altered, any passport, visé or other permit or evidence of permission to enter the United States;

Using false,
etc., passports.

(g) For any person knowingly to use or attempt to use or furnish to another for use any false, forged, counterfeited, mutilated, or altered passport, permit, or evidence of permission, or any passport, permit or evidence of permission which, though originally valid, has become or been made void or invalid.

Punishment
for violations.

SEC. 2. That any person who shall willfully violate any of the provisions of this Act, or of any order or proclamation of the President promulgated, or of any permit, rule, or regulation issued thereunder, shall, upon conviction, be fined not more than \$5,000, or, if a natural person, imprisoned for not more than five years, or both; and the officer, director, or agent of any corporation who knowingly participates in such violation shall be punished

Corporation
official
participating
therein.

by like fine or imprisonment, or both; and any vehicle or any vessel, together with its or her appurtenances, equipment, tackle apparel, and furniture, concerned in any such violation, shall be forfeited to the United States.

Forfeiture
of vehicle,
vessel, etc.

* * * * *

SEC. 5. That this Act shall take effect upon the date when the provisions of the Act of Congress approved the 22d day of May, 1918, entitled "An Act to prevent in time of war departure from and entry into the United States, contrary to the public safety," shall cease to be operative, and shall continue in force and effect until and including the 4th day of March, 1921.

Effective on
termination of
previous act.

Duration.

Received by the President, October 29, 1919.

[NOTE BY THE DEPARTMENT OF STATE.—The foregoing act having been presented to the President of the United States for his approval, and not having been returned by him to the house of Congress in which it originated within the time prescribed by the Constitution of the United States, has become a law without his approval.]

[This Act never became operative]

House Report No. 382, Sixty-Sixth Congress, First Session, to Accompany H. R. 9782 (Act of November 10, 1919)

EXTENSION OF PASSPORT CONTROL

OCTOBER 14, 1919.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

Mr. ROGERS, from the Committee on Foreign Affairs, submitted the following

REPORT.

[To accompany H. R. 9782.]

The Committee on Foreign Affairs, to which was referred the bill (H. R. 9872) to regulate further the entry of aliens into the United States, having had the same under consideration, reports it back to the House with certain amendments with the recommendation that the amendments be agreed to and that the bill as amended do pass.

The amendments are as follows:

Page 3, line 7, strike out "\$10,000" and insert "\$5,000."

Page 3, line 8, strike out "twenty" and insert "five."

Your committee, in considering legislation of this character, has had the benefit of the testimony of the Secretary of State, of Hon. Wilbur J. Carr, Director of the Consular Service, and of R. W. Flournoy, Jr., Chief of the Division of Passport Control of the State Department. Hon. Albert Johnson, of Washington, the author of House joint resolution 205, for which the present bill is in the nature of a substitute, also appeared before the committee in behalf of legislation of this character.

The act of Congress entitled "An act to prevent in time of war departure from and entry into the United States contrary to the public safety," approved May 22, 1918,

established a strict system of passport control for all travelers to and from the United States, whether American citizens or not. By its terms, this act ceases to be operative with the termination of the present war. The recommendation of the Secretary of State is to the effect that so far as persons entering the United States, whether American citizens or aliens, are concerned, the act should, for the national welfare, be extended for a period of one year beyond the termination of the war. Your committee, after careful consideration, has decided that, in spite of certain administrative difficulties, it is wiser not to extend the act in so far as the controlling of American citizens is concerned. On the other hand, your committee has been fully convinced that urgent considerations of public welfare make desirable the extension of the act so far as incoming aliens are concerned for the period of at least one year.

It will be noted that the existing act is applicable to four classes of persons: (1) Outgoing Americans, (2) outgoing aliens, (3) incoming Americans, and (4) incoming aliens.

The recommendation of the State Department, as previously stated, was that control over the first two classes should cease with the promulgation of the treaty of peace. Your committee agrees with this conclusion, but goes further and recommends that the third class—incoming Americans—be also freed from restraint or control when the present war technically comes to an end.

The Secretary of State testified that for some time—probably for some years—the other great Governments of the world would doubtless continue in effect the very rigid passport requirements which have prevailed since 1914. This being true, it is quite probable that American travelers abroad will, as a matter of common precaution, and as a practical matter, need passports after the present law lapses; but your committee, while fully recognizing this fact, felt that so far as our own legislation was concerned, the control of the movements of American citizens desiring to travel abroad should again become unhampered and unembarrassed at the earliest possible moment.

The bill recommended by your committee follows almost verbatim the language of the present act. The only changes of consequence are the following:

(1) Whereas the present act ~~imposes~~ a penalty for violation of not more than \$10,000 fine, or not more than 20 years' imprisonment, your committee recommends a maximum of \$5,000 fine and 5 years' imprisonment. This recommendation is upon the theory that the very drastic penalties provided in the present act were made to meet war conditions and war emergencies, and that as the proposed bill becomes operative only with the arrival of peace, the original penalties may safely and properly be greatly reduced.

(2) Section 2 of the original act, which dealt with the movements of American citizens, is altogether eliminated for reasons above indicated.

.

(4) Section 5 of the bill provides that it shall take effect when the provisions of the present act cease to be operative and shall continue in force and effect for one year thereafter.

The first section of the bill provides that it may cease to become operative within the year, if so ordered either by the President or by Congress.

The reasons for continuing passport control in the case of incoming aliens for at least one year seem to your committee to be numerous and compelling. As stated by Secretary Lansing, it is recommended by the Department of State "because of the great unrest and disorder throughout Europe at the present time, and the fact that many persons are seeking admission to the United States, of whom a large number seem to be unsuitable for future citizenship or else are engaged in very radical propaganda against our institutions."

An Act Making appropriations for the Diplomatic and Consular Service for the fiscal year ending June 30, 1922.

[Public—No. 357—66th Congress; H. R. 15872.*]

EXPENSES, PASSPORT CONTROL ACT.

For expenses of regulating entry into the United States, in accordance with the provisions of the Act approved May 22, 1918, and of this Act, to be immediately available, \$600,000: *Provided*, That the provisions of the Act approved May 22, 1918, shall, in so far as they relate to requiring passports and visés from aliens seeking to come to the United States, continue in force and effect until otherwise provided by law.

Approved, March 2, 1921.

[22 U. S. C. §227]

*See War Act of 1918, *supra*, pp. 32-4.

AN ACT

To increase passport fees, and for other purposes.

[Public—No. 136—72d Congress; H. R. 9393]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2 of the Act entitled "An Act to regulate the issue and validity of passports, and for other purposes," approved July 3, 1926, as amended by the Act entitled "An Act to provide for the renewal of passports," approved July 1, 1930, is amended to read as follows:

"SEC. 2. That the validity of a passport or passport visa shall be limited to a period of two years, *Provided*, That a passport may be renewed under regulations prescribed by the Secretary of State for a period, not to exceed two years, upon payment of a fee of \$5 for such renewal, but the final date of expiration shall not be more than four years from the original date of issue: *Provided further*, That the Secretary of State may limit the validity of a passport, passport visa, or the period of renewal of a passport to less than two years: *Provided further*, That the charge for the issue of an original passport shall be \$9."

Approved, May 16, 1932.

[22 U. S. C. §217a]

Miscellaneous

Excerpts From Letter of Secretary of State William J. Bryan, Dated January 20, 1915, in Answer to a Letter of the Chairman of the Senate Committee on Foreign Relations, William J. Stone.

(12) *Great Britain and her allies are allowed without protest to disregard American citizenship papers and passports.*

American citizenship papers have been disregarded in a comparatively few instances by Great Britain, but the same is true of all the belligerents. Bearers of American passports have been arrested in all the countries at war. In every case of apparent illegal arrest the United States Government has entered vigorous protests with request for release. The Department does not know of any cases, except one or two, which are still under investigation; in which naturalized Germans have not been released upon representations by this Government. There have, however, come to the Department's notice authentic cases in which American passports have been fraudulently obtained and used by certain German subjects.

The Department of Justice has recently apprehended at least four persons of German nationality who, it is alleged, obtained American passports under pretense of being American citizens and for the purpose of returning to Germany without molestation by her enemies during the voyage. There are indications that a systematic plan had been devised to obtain American passports through fraud for the purpose of securing safe passage for German officers and reservists desiring to return to Germany. Such fraudulent use of passports by Germans themselves can have no other effect than to cast suspicion upon Amer-

ican passports in general. New regulations, however, requiring among other things the attaching of a photograph of the bearer to his passport, under the seal of the Department of State, and the vigilance of the Department of Justice, will doubtless prevent any further misuse of American passports.*

[For. Rels., 1914 Supp., p. xii]

*Quoted in letter of State Department Counselor Frank L. Polk to Representative John J. Fitzgerald, dated August 18, 1916 (For. Rels., 1915 Supp., pp. 913-4).

*United States Committee on Public Information, German
Plots and Intrigues in the United States During the
Period of Our Neutrality (July, 1918).*

III. ATTEMPTS TO GIVE GERMANY MILITARY AID

FORGERY OF PASSPORTS

The third chief purpose of Germany's diplomatic officials in the United States was to send troops and munitions to the Central Empires. When the war began in July, 1914, large numbers of German reservists were living in America, and in order to avoid capture on their way home many of them sought under false names to obtain passports as American citizens. They thus violated the law that American passports shall be issued only to citizens of the United States, and also discredited genuine passports, thereby causing delay and distress to American citizens abroad. Their action also was a violation of America's neutrality and endangered its national honor and safety.

In order to have at hand an adequate supply of counterfeit passports the German Embassy maintained an office in New York City, directed by Captain von Papen, where they were forged by wholesale. German consuls in distant cities, as Chicago and St. Paul, were informed concerning this office and sent there for passports the reservists from their several localities.

These operations were known almost from the first to the United States Secret Service. Hans A. von Wedell, who managed the office, took alarm and fled in November, 1914, supplied with money by von Papen. In the following letter, found on one of his associates who was arrested before he had an opportunity to post it, von Wedell exonerates himself from the charge of deserting his post and shows the complicity of the German Ambassador in the business of forging passports:

*His Excellency, The Imperial German Ambassador,
Count von Bernstorff, Washington, D. C.:*

... My work was done. At my departure, I left the service well organized, and worked out in minute detail, in the hands of my successor, Mr. Karl Ruroede, picked out by myself. . . . Also, Ruroede will testify to you that without my preliminary labors, it would be impossible for him, as well as for Mr. von Papen, to forward officers in any way whatever. [He then explains in detail his reason for hiding.] . . . Ten days before my departure I learned from a telegram sent me by Mr. von Papen . . . that Dr. Starck had fallen into the hands of the British. That gentleman's forged papers were liable to come back and could . . . be traced to me. Mr. von Papen had repeatedly and urgently ordered me to hide myself. Mr. Igel told me that I was taking the matter altogether too lightly, and that I ought, for God's sake, to disappear. . . .

With expressions of the most exquisite consideration,
I am your Excellency's,

Very respectfully,

(Signed) HANS ADAM VON WEDELL

The connection of von Wedell with the German Embassy in the United States is further shown by the following entry in the checkbook of Captain von Papen:

1914			
Nov. 21.	A. von Wedell		\$300
" 24.	(for Wedell)		240
" 27.	(for Wedell)		150
" 30.	Wedell		500
Dec. 5.	Wedell		500
" 8.	Wedell (journey money)		300
" 22.	von Wedell		800

Karl Ruroede at once took up von Wedell's work in a different office. He was under the constant surveillance of Secret Service men, one of whom entered his employ and made frequent reports, from one of which an extract follows, concerning conversations with Ruroede:

"You say, von Wedell spent \$3500 of his own money?" I asked. "No, no, he got it from the fund." "Well, who puts up this fund?" "The Government." "The German Government?" I asked. "Yes," said Ruroede. "You see, there is a German captain here who is attached to the German Embassy at Washington. He has a list of German reservists in this country, and is in touch with the German consulates throughout the country, and in Peru, Chile, Mexico, etc. He communicates with them, and the consuls send reservists on to New York. On their arrival the Captain tells them . . . 'Go down and see Ruroede.' Sometimes he gives them his card. . . . He draws on this fund for \$200 or \$300 or \$1000, whatever he needs, and the checks read, 'On account of Reserves.' You see they have to have food and clothing, so there's nothing to show that the money is used for passports. . . . I meet the captain once a week . . . and he gives me whatever money I need. . . . You know there must be no letters, no accounts, nothing in writing."

"If things work out all right now," he said, "we shall be good for three or four hundred passports, and no telling how many more."

When the Norwegian steamer *Bergensfjord* sailed on January 2, 1915, she had on board four German reservists, all of whom were provided with American passports by Ruroede, who had unknowingly obtained them from a United States Secret Service man. As the big liner dropped down the bay she was followed by a United States Revenue Cutter with Federal officers. At quarantine they

boarded the steamer, arrested the reservists, and brought them back to New York. Ruroede also was arrested, pleaded guilty at his trial, and was sentenced to three years in the Federal penitentiary at Atlanta. The reservists, guilty of forgery, were punished by fines of \$200 each. Charles A. Oberwager was Ruroede's counsel, and under date of January 6, 1915, Captain von Papen's checkbook contained the following entry: "(For Oberwager) \$2000."

German agents in Chicago were making a similar use of American passports. A German reservist reported the following conversation with G. H. Jacobsen, who was implicated in many criminal undertakings in aid of Germany:

Jacobsen told me that an officer who had someone else's citizenship [passport] had shipped for Germany, and when he reached Holland the papers would be delivered to some German agent and sent back, and I could then use them to leave the United States.

Jacobsen obtained citizenship papers for the use of German officers from members of the German Club; and when the description did not fit the person who was to use it, a German printer in Chicago made the description fit by changing it.

There are many cases, from which the following are a selection, in which American passports were fraudulently procured and used for unneutral purposes. Captain Boy-Ed, Richard P. Stegler, a German citizen, Richard Madden, and Vincent Cook secured through conspiracy an American passport to be used by Stegler while serving as a spy in Europe. Boy-Ed financed and directed Stegler's operations, but was protected from prosecution by his diplomatic immunity. Madden and Cook were sentenced to ten months and Stegler to sixty days in jail.

Albert Sanders and Charles Wunnenberg, German agents in this country, have pleaded guilty in New York to the charge of sending German spies to England equipped with

American passports. Gess D. Berko, an American citizen, secured an American passport which was stolen by Stephan Csiszar, an attaché of the Austrian-Hungarian Consulate at New York City, to return to Austria.

The diplomatic officials of Germany hired American citizens protected by genuine passports to use them for dishonorable and unneutral purposes, such as to carry German dispatches and to act as spies in England. E. G. Woodford, for example, who was sent to Europe by German officials here, was paid \$550 for his services on orders from Berlin. The payments to him are recorded in the cashbook of Wolf von Igel.

[Pages 35-38]

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No. 287

IN THE
Supreme Court of the United States

OCTOBER TERM, 1940

EARL RUSSELL BROWDER

Petitioner

against

UNITED STATES OF AMERICA

REPLY BRIEF FOR PETITIONER

CARL S. STERN
Counsel for Petitioner

CARL S. STERN
CAROL KING
BENJAMIN GOLDRING
Of Counsel

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SUBJECT INDEX

PAGE

- I. The Government's contention that the use of a passport for the correct identification of a returning American is a use within the statute 1
- II. The Government's contention that a person who uses a passport for a non-deceptive purpose or for a purpose not evil in itself is willfully using the passport 10
- III. The Government's argument that the question of willfulness was not properly raised (Government's brief, pp. 34-35) 13
- Press Release, and Departmental Passport Regulation Promulgated After Outbreak of European War of 1939 15

TABLE OF AUTHORITIES

Cases:

	PAGES
Flora v. Rustad	6n, 7, 10
People v. Clark	13, 14
United States v. Adielizzio	8
United States v. Illinois Central Railroad Co.	11
United States v. Katz	10
U. S. ex rel. Lamp v. Corsi	12
United States v. Mouyas	10n
United States v. Murdock	11, 13, 14
United States v. Warszower	11
United States v. Weitzel	10

Other Authorities:

Statutes:

Act of March 2, 1907	3n
Act of March 26, 1910	7n
Act of February 5, 1917	7
Act of May 22, 1918	6
Title IX of the Espionage Act	2, 3, 4, 8, 11
U. S. C., Title 8, § 180a	10n
U. S. C., Title 8, § 220	10n
U. S. C., Title 18, § 80	10n
U. S. C., Title 18, § 88	10n
U. S. C., Title 18, § 141	10n

Administrative:

	PAGES
Chinese Rules of October 1, 1926, Rule 16, Subdivision 11	3
Circular instructions by Secretary of State to the American Diplomatic and Consular Officers, November 18, 1911	3
Joint order of July 26, 1917 of the State and Labor Department	2
Notice to Bearers of Passports	5, 9
Official Bulletin of the U. S. Committee on Public Information	4n
Passport Regulations of May 8, 1939	9
Passport Rule 4, Rules of June 7, 1911	3
Presidential passport rules of March 31, 1938	7
Recommendations of the Attorney General	4n
State Department press release and passport regulations of September 4, 1939	7

Miscellaneous:

House Hearings on H. R. 12211 (Feb. 3, 4, 7, 1920), Comm. on For. Aff. 66:2	6n
House Hearings on H. R. 11947 (May 12, 1926). Comm. on For. Aff., 69:1	6n
House Hearings on H. R. 10826 (Apr. 15, 16, 1930), Comm. on For. Aff., 71:2	6n
Moore's Digest of International Law	9
N. Y. Times, July 27, 1917	4n
N. Y. Times Index	4n

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Petitioner's contention is that no crime was committed because the use was neither (a) a use to pass the boundaries in foreign countries or (b) a deceptive or evil use.

It is incumbent upon the government to show that Browder's employment of the passport for identification was both a passport use within the contemplation of Title IX and a willful use. If it fails in either respect the government's case falls.

I.

The Government's contention that the use of a passport for the correct identification of a returning American is a use within the statute.

The contention of the defense is that such a use was not within the contemplation of the legislature at the time the statute was passed (Petitioner's brief, pp. 7-9), and that at no time since has anything happened to bring it within the purview of the statute.

(1) The government challenges (Government's brief, p. 23) petitioner's description of the passport concept held by Congress at the time of the passage of Title IX (Petitioner's brief, p. 14). The court below, however, was in accord with petitioner (R. 402).

A re-examination of the statutes and administrative regulations in the light of this challenge makes plain the inadequacy of the Government's authorities to support its skepticism.

At the time the act was passed there were two classes of statutes: (1) foreign relations statutes, (2) immigration statutes. The immigration laws cover the question of entry into this country. Title IX on the contrary was addressed by Congress to the subject of foreign relations. Its language, context, legislative and public history make this plain (Petitioner's brief, pp. 6-9). The Immigration Service was not even consulted as to this matter (*id.*, p. 14)¹.

(2) President Wilson declared in 1917 at the time the act was passed, "Passports issued by the Department of State or its diplomatic or consular representatives are intended for identification and protection in foreign countries and not to facilitate entry into the United States." He stated the reason: "Immigration being under the supervision of the Department of Labor" (see Petitioner's brief, p. 15, and footnote, and Appendix, p. 2; also Government's brief, p. 26).

The rule is in harmony with the authorities. The government erroneously seeks to confine the rule to Chinese-Americans (Brief, p. 25). There is no such limitation.

(a) The government admits that there is no reference to Chinese-Americans in the rules published in 1916 and 1917, but it says that this must have dropped out "inexplicably" (Government's brief, p. 25). The reason that the government can find no explanation is that there is no

¹When, after the passage of Title IX, there was a war time administrative restriction placed on entry into the United States it was by the joint order of the State and Labor Department (Joint Order of July 26, 1917).

explanation that will support the government's position. The statement of President Wilson is unqualified. It is in line with the contemporary and earlier authorities.

(b) Secretary Bryan in 1915 used the same language in referring to persons who had declared their intention to become citizens (Appendix to Petitioner's brief, p. 5). "A passport may be granted to a declarant under the statutory provision quoted above² for purposes of identification, and protection in foreign countries, other than his country of origin, but not for the purpose of facilitating reentry into this country."

(c) Secretary Knox made the same statement in connection with naturalized citizens concerning whom questions as to expatriation had arisen. He said, "a passport should not be issued merely to facilitate entry into the United States" (Circular instructions by Secretary of State to the American Diplomatic and Consular Officers, November 18, 1911).

(3) Although the rule was not limited to Chinese-Americans, the instance of the Chinese-Americans merely emphasizes the rule. For as to them it was permissible though not required for Chinese-Americans leaving the country to get return certificates from the *Labor Department* (Chinese Rules of October 1, 1926, Rule 16, Subdivision 11). The State Department would not issue passports to them unless as a prerequisite to departure they had obtained such certificates from the "Labor Department (Passport Rule 4, Rules of June 7, 1911).

(4) The Government's brief (pp. 11, 29n) suggests that Congress, at the time of enactment of Title IX, was not unaware of problems arisen in connection with entry. Its Appendix prints material concerning events subsequent to the recommendation and introduction in Congress of Title IX, but prior to enactment.

²The statute was the Act of March 2, 1907 (Appendix to Petitioner's brief, p. 1).

The suggestion is without basis. The material was not made public³. The Government does not show that the matter was brought to the attention of Congress⁴.

(a) Title IX was passed on June 15, 1917. It was proposed to Congress in June 1916. The bill that was finally passed was, with slight exceptions, not in any sense material (see Appendix to Petitioner's brief, pp. 6-8), in precisely the form that it was submitted by the Attorney General in 1916.

(b) Since in the entire debate there is no indication that the question of returning Americans was considered by Congress or that the Attorney General, if he had this problem in mind stated it to Congress, it cannot be assumed that this use was in the mind of Congress and/or that it entered into the passport concepts that were at the base of Title IX⁵.

(c) It was only at the end of 1917 when the Attorney General made his annual report, *six months* after Title IX was passed, that he recommended the passage of a law regulating the "entry and departure of all persons, both citizens and aliens; to and from the United States and its

³No mention of it is made in the Congressional Record, departmental reports, Official Bulletin of the U. S. Committee on Public Information, or in the *N. Y. Times* Index.

⁴The material is addressed to two situations: 1) a particular situation concerning emergency passports issued by our Berlin embassy after our rupture of relations with Germany; 2) the visaing by our representatives abroad of foreign (more particularly Scandinavian—see *N. Y. Times*, July 27, 1917, p. 1, cols. 6-7), *not American*, passports. With respect to *American* passports, it is noted that "furthermore, it is possible" that false American passports "may" be used (Government's appendix, p. 53).

⁵It is desirable here to clear up an inadvertence in the argument of the counsel for the government. He read from the recommendations of the Attorney General (Appendix, p. 10) "many acts committed in the United States * * * are not now punishable by any Federal Criminal Law", but it must be recalled that the Attorney General's recommendations were dealing with seventeen titles other than the passport title. They referred to such acts as sabotage in American factories, etc., and with respect to passports, to such matters as obtaining a passport in America or forging one here.

possessions". And then his recommendation was limited to the period "during a state of war" (Appendix to petitioner's brief, p. 16).

(5) The government's contention that in any event what happened after the passage of the act indicates that the use of a passport by returning Americans became a sanctioned use (Government's brief, p. 27).

(a) To sustain the proposition that the first world war period worked a change in the passport concept, the government is compelled to rely heavily upon the excerpt from the State Department Notice to Bearers of Passports, Series. 1929 to date.

In the excerpt, the citizen is advised to carry a passport even when not required in a foreign country. The reason given is that it will save the inconvenience of applying for one abroad "should the holder desire to travel in countries where passports are required". The excerpt then adds "It will also enable the holder to establish his American citizenship upon his return to the United States and thus facilitate his entry." It concludes by saying that the citizens who leave without passports "should carry with them proof of their citizenship, such as birth, baptism or naturalization certificates".⁶

⁶The excerpt in full reads: "17. Advisable to carry passports even when not required in a foreign country.—An American citizen leaving the United States for a country where passports are not required is nevertheless advised to carry a passport, except in travel to Canada or Mexico, or on round-trip cruises mentioned in the last sentence of the preceding paragraph. The obtention of a passport prior to departing from the United States may later save the time and inconvenience of applying for one abroad should the holder desire to travel in countries where passports are required. It will also enable the holder to establish his American citizenship upon his return to the United States and thus facilitate his entry. American citizens who leave the United States without passports should carry with them proof of their citizenship, such as birth, baptism, or naturalization certificates."

The provision in effect 1921-1925 (Petitioner's brief, p. 17, footnote 27), advises each native American leaving without a passport to have in his possession "a birth or baptismal certificate or a sworn statement from a reputable American citizen certifying to the place and date of his birth * * *" and states that "This evidence is often necessary to obtain return (passage to the United States) and is useful to ensure speedy reentry into the United States."

Certainly this advice cannot be said fundamentally to have enlarged or changed the passport concept.

(b) The 1918 happenings negate the idea that the passport concept was extended as the government implies. The act of 1918 regulated entry to the United States by requiring passports and visas from aliens, and passports from citizens. It attached heavy penalties for violations (See Appendix to petitioner's brief, p. 34).

The act was never anything but a war measure. It was recommended by the Attorney General as a war measure (*Idem*, p. 16) and it was entitled "An Act to prevent in time of war departure from or entry into the United States contrary to the public safety" (*Idem*, p. 32).

The deliberate refusal of Congress to extend the passport concept is shown by the fact that though the act was continued as to aliens, Congress refused over the protests of the administrative departments, to extend it as to citizens⁷ (*Idem*, pp. 39, 40, 41; petitioner's brief, p. 18n).

(c) Later evidence that the concept of a passport as a foreign travel document has never changed is supplied by the following:

(i) 1920 hearings on fees charged for passports and for visaing foreign passports (Mr. Carr—director of consular service: "The passport serves as a means of identification abroad").⁸

(ii) 1926 hearings on validity of passports (Mr. Carr—Assistant Secretary of State: A passport "is a certificate of citizenship for international purposes").⁹

⁷Even as to aliens the penal provisions were not extended,—merely the regulatory provisions (*Flora v. Rustad*, 8 F. [2d] 335, C. C. A. 8).

⁸Comm. on For. Aff., 66:2 House, Hearings on H. R. 12211 (Feb. 3, 4, 7, 1920), at p. 9.

⁹Comm. on For. Aff., 69:1 House, Hearing on H. R. 11947 (May 12, 1926), at p. 7. See also Comm. on For. Aff., 71:2 House, Hearings on H. R. 10826 (April 15, 16, 1930).

(iii) Presidential passport rules 124, 125, of March 31, 1938 (our Appendix, p. 21).

(iv) State Department press release and passport regulations of September 4, 1939 (directed to passport "use": "use in traveling from the United States to any country in Europe" and "use in Europe").¹⁰

The only reference to the passports of returning Americans is that they will be collected by the State Department "for safe keeping" and to assure that they will not again be used except in accordance with the new regulations.

(d) The suggestion (Government's brief, pp. 10, 23) that the Immigration Act of 1917 enlarged the concept of the passport use does not bear analysis—not only is this true when the act is read against the background of the facts above stated, but it appears from the provisions of the act itself.

That Act was by no means a restriction act but simply excluded obviously undesirable aliens. Under it and under all prior immigration acts, deportation was the sole weapon employed against illegally-entered aliens—with a single exception.¹¹ This the Government acknowledges¹² in its citation of *Flora v. Rystad*, 8 F. (2d) 335 (C. C. A. 8).

To borrow the language of the Court in *Flora v. Rystad*, 8 F. (2d) 335, at p. 337, "a reversal of" the policy that passports involve foreign relations and hence are within the jurisdiction of the State Department and that entry into the United States is a matter for the immigration law—with a consequent change in the passport concept—"ought to be based on a clear legislative declaration; and

¹⁰These are printed *infra*, pp. 15-18.

¹¹This related to the return of an alien previously deported on account of prostitution (section 4 of 1917 Act; Act of March 26, 1910, section 3).

¹²Government's brief, p. 33.

not a judicial construction of statutes which leave the subject in such uncertainty and doubt as do the statutes here under consideration."

(6) The government contends that despite the fact that Congress *deliberately* declined to require passports of returning Americans, nevertheless the concept of the passport use was so enlarged by the advice to passport bearers that the use to enter the country became a customary use and hence a use that now comes within the penal provisions even though it may not have been included originally (Government's brief, pp. 26-7).

(a) Whether it has become a customary use is not the question. The question is whether it is the kind of use the Congress intended to make criminal (Petitioner's brief, pp. 20-21).

Title IX is concerned with matters relating to foreign relations under the jurisdiction of the State Department, and not to immigration matters within the jurisdiction of the Labor Department. (Compare *United States v. Adielizzio*, 77 F. (2d) 841, 843, Petitioner's brief, p. 19, footnote 32).

(7) The government concedes that not all uses of a passport are within the condemnation of the Statute (Government's brief, p. 17). It thus avoids some of the arguments in petitioner's brief, page 17. But it then proceeds to lay down as a test that the use may be restricted to travel uses—provided that it includes the return to America of one of its citizens (Government's brief, p. 16).

There is no authority for this except the Government's brief. The contention seems to be based largely on the idea that even though a passport so far as proving American birth is concerned is on no higher plane than non-passport documents—the acquisition of it for that purpose is within the ordinary incentives that would make one embark on a fraudulent adventure.

We suggest that it is unlikely that anyone would take the grave risks involved in order to obtain a passport as proof of citizenship when other data not involving such risk are readily available.

We submit that the distinction between the prohibited uses and those not made criminal is the distinction, so far as American citizens are concerned, between the use for foreign travel and that for identification in this country.

(8) The government argues that there is no difference between identification abroad and in this country. But this overlooks that passports when used abroad serve a different purpose than birth certificates or any other document. A reference to the instructions to bearers of passports shows that many foreign countries have for years required passports as a condition to enter. A birth certificate will not serve for this purpose. We do not believe that the Government will suggest that a birth certificate would ordinarily be visaed by a foreign embassy or consulate (see also Petitioner's brief, pp. 17-18).

The use of expired passports seemed to present an illustration of the distinction (Petitioner's brief, p. 16).

An expired passport has no validity as a passport to enable one to cross boundaries. Its use as identification is clearly permissible.

(9) The government questions whether there is any authority for this conclusion (Government's brief, p. 20). But the Government ignores the reference to Moore's Digest of International Law (Petitioner's brief, p. 16). It also ignores the regulations of May 8, 1939 (§ 4, p. 2). It does not consider the Notice to Bearers of Passports which suggests that citizens who leave without passports should carry with them "proof of their citizenship, such as birth, baptism or naturalization certificates" (*supra*, p. 5). This language is certainly broad enough to include expired passports.

(10) The Government refers to possible gaps in the enforcement of the criminal law if petitioner's views are accepted.

(a) Many of the arguments are disposed of by distinctions drawn between citizens and aliens. Many of the gaps, if there are gaps, have been closed by other or subsequent legislation.¹³

(b) That there may be possible gaps in enforcement is no reason for distorting or reversing, other than by legislative action, deliberate governmental policy. *United States v. Weitzel*, 246 U. S. 533, pp. 542-3; *Flora v. Rustad*, *supra*; *United States v. Katz*, 271 U. S. 354. Especially is this true in criminal cases (Petitioner's brief, p. 19 and cases there cited).

II.

The Government's contention that a person who uses a passport for a non-deceptive purpose or for a purpose not evil in itself is willfully using the passport.

(1) Petitioner has pointed out that there are two kinds of misrepresentations in applications (a) those that result in the issuance of passports that certify to a lie; (b) those that result in truthful passports. It was suggested that Congress make punishable the fraudulent obtaining in both instances, but the fraudulent use only where the passport was deceptive (Petitioner's brief, p. 10).

¹³18 U. S. C. § 80 (making fraudulent statements); 18 U. S. C. § 88 (conspiracy to defraud); 8 U. S. C. § 220 (forging visas or falsely impersonating another person, etc. held to make criminal the fraudulent use of an alien of an American passport. *United States v. Monyas*, 42 F. [2d] 743). The foregoing acts apply to aliens and citizens alike.

An alien is likewise punishable under 8 U. S. C. § 180a for acts involved in a fraudulent entry; and under 18 U. S. C. § 141 for false swearing in naturalization cases.

Petitioner questioned whether Congress intended to visit drastic punishment on a person using a paper to make a truthful representation where substitutes would have done just as well and where it was hardly conceivable that he would have failed to use the simple alternatives that were at hand if he knew that drastic consequences would follow such a use (Petitioner's brief, p. 6).

(2) If we assume that a non-deceptive use is punishable, it must be a willful and knowing use. Counsel for the government at the argument indicated that willful meant in effect no more than intentional or conscious use (Government's brief, p. 36). But the same counsel in his brief in the *Warszower* case in the Circuit Court of Appeals argued that the term imported that the use prohibited by Section 2 of Title IX was one "with bad faith and evil intent" (See full quotation, Petitioner's brief, p. 13).

We submit that counsel was correct in the *Warszower* case and incorrect in his argument in this Court. Willfully means something more than knowingly (Petitioner's brief, p. 11n), and the history of the statute reenforces this conclusion (*id.*, pp. 7-8, 11). This is the ordinary case of a statute drawn to punish offenses involving moral turpitude. It is not a case in which the act is strictly defined and punished regardless of intent as are some of the cases cited in Government's brief, pages 31-2, n11.

The Government seems to argue (Brief, pp. 35-41) that willfully in the ordinary criminal case involving turpitude does not mean "with evil purpose or criminal intent".

The argument has been so recently rejected in both *United States v. Murdock*, 290 U. S. 389 and in *United States v. Illinois Central Railroad Co.*, 303 U. S. 239, that extended discussion is unnecessary. The government seems to imply that the *Illinois Central* case indicates a whittling down of the general principle (Brief, p. 38). That case definitely decided that willfully meant something more than knowingly (p. 242). It dealt not with a criminal offense

but with a civil penalty and it held that willfulness was sufficiently shown when a railroad in violation of an express requirement that cattle should not be confined for more than 36 hours, negligently failed to see that this requirement was lived up to.

The government argued in that case (Brief, p. 14) that it was not a criminal case but one for a civil penalty; that "the desire to give relief was more dominant than to inflict punishment."

(3) The government contends that the prior conduct of the petitioner precludes good faith. There is no possible justification for this argument either in law or in fact.

(a) Petitioner in 1934 abandoned the practice of applying for passports in other names and applied in his own name. This was a definite break with the past practices.

(b) The representation "None" may have meant to the petitioner that there were no passports issued to him in his name,—certainly not valid passports (Compare *U. S. ex rel. Lamp v. Corsi*, 61 F. [2d] 964, 965 (C. C. A. 2), holding that a visa obtained by a false representation was not a valid visa).

(c) Regardless of the meaning of the representation "None" contained in the application for the 1934 passport, the passport that was used was a renewal passport. Neither the renewal passport nor the application for it contained any misrepresentation (Petitioner's brief, p. 23). Since it was the renewal passport that was used, petitioner may have assumed that the representation "None" had nothing to do with the passport that he then possessed.¹⁴

¹⁴The fact that the passport was a renewal passport and the contention that it contained no misrepresentation was made a ground for dismissal of the indictment, refusal of which was excepted to (Petitioner's brief, p. 24) and was raised by the 19th and 20th assignments of error (R. 386). It was not specifically referred to as a ground for certiorari.

The distinction between a renewal passport and a new passport is shown, in petitioner's brief, pages 23-4, to have been the difference between the surrender of the last passport for cancellation and the presentation of the last passport for stamping.

(d) Assuming that petitioner believed even that the taint of "None" survived the renewal, but that he knew that he did not need a passport to enter the country,—a fact that was stated in the instructions to passport bearers given to him when he received his passport—it seems inconceivable that his act in using the passport at the pier could have been willful. Why should he take this risk when other means of identification were so readily available? (Petitioner's brief, pp. 24-25).

III.

The Government's argument that the question of willfulness was not properly raised (Government's brief, pp. 34-35).

(a) The question that there was no indictable use and that there was no evidence to submit to the jury was raised over and over again (R. 226, 227, 228, 235, 236, 283, 284, 286. Assignments of Error 3rd, 16th, 18th, 30th, 31st; R. 382-390).

(b) It is only if this court holds that the use was an indictable use and that there was evidence to go to the jury—that a question would be presented whether petitioner can now challenge the charge of the judge, clearly erroneous on the subject of willfulness (Petitioner's brief, p. 29).

The government seems to imply that the failure of the defendant to testify affects the situation (Government's brief, p. 39). Petitioner's brief refers (p. 29) to *United States v. Murdock*, 290 U. S. 389, and (p. 25, footnote 38) to *People v. Clark*, 242 N. Y. 313. In each of these cases there was a violation of the express provisions of the statute: in the *Murdock* case the defendant refused to furnish information; in the *Clark* case a public officer received an emolument in excess of what was authorized

by law. In each case the defendant failed to take the stand. In each case the court reversed because of the error in excluding from the jury the issue of evil intent. In this case unlike the *Murdock* and *Clark* cases there was no violation of a precise statute. The act prohibited was a use—a general term. The government concedes only certain uses are indictable. And it has supplied its own interpretation of where the prohibited uses begin and end (see *supra*, p. 8).

Now although there was no exception to the charge, the viewpoint of the defense quite at variance with the charge had been presented by the various motions and requests (Petitioner's brief, p. 28, and see also R. 227).

There are, to say the least, grave doubts in any view of the case (*supra*, pp. 10-13) whether petitioner's conduct was willful. He was entitled to instruction that willful meant something more than a conscious use.

The court's failure was error so fundamental, the charge being in effect a direction to convict (Petitioner's brief, p. 28), that we submit that justice requires that the judgment be reversed.

Respectfully submitted,

CARL S. STERN
Counsel for Petitioner

CARL S. STERN
CAROL KING
BENJAMIN GOLDRING
Of Counsel

**Press Release, and Departmental Passport Regulation
Promulgated After Outbreak of European War of
1939.**

In view of the exigencies of the present situation in Europe, particularly the danger of travel to and from Europe, the hazards which may be encountered in residing in belligerent countries, and the shortage of steamship facilities to transport the many thousands of American citizens now in Europe who have been urged to return to the United States, the Secretary of State has deemed it advisable to prescribe regulations under which no passport which has heretofore been issued shall be valid for use in traveling from the United States to any country in Europe unless it is submitted to the Department for validation for such use. Under the new regulations, before the Department of State will validate any passport heretofore issued or issue any new passports for use in Europe, it will be required that documentary evidence be submitted to it showing the imperative necessity for traveling to Europe. It is contemplated by the new regulations to restrict the use of passports only to those who can show an imperative necessity for traveling in Europe and at the same time to take every possible precaution to assure the importance of American passports as definitely identifying and establishing the citizenship of the person to whom they are issued. Extraordinary care will thus be taken in this regard and consequently persons desiring to have passports already issued to them validated for future use in Europe and persons desiring to obtain new passports for use therein are urged to submit their applications at least three weeks in advance of their expected sailing.

In order to assure strict compliance with the new regulations, passports of American citizens intending to depart for Europe will be carefully examined to see that they have been validated for use in Europe. Upon the return of American citizens their passports will be taken up and returned to the Department of State for safe keeping and to assure that they will not again be used except in accordance with the new regulations.

The Passport Agencies in New York, Boston, Chicago and San Francisco are being advised of the new regulations and for the convenience of the officers in the various foreign consulates situated in the cities mentioned they are being instructed to furnish each such officer with a copy of the new regulations requiring the validation by the Department of passports heretofore issued in order that they may hereafter be used in traveling to Europe. The new regulations are as follows:

DEPARTMENTAL ORDER

No. 811

By virtue of and pursuant to the authority vested in me by Section I of the Act of July 3, 1926, 44 Stat. 887 (U. S. C., Title 22, Section 211a), and by Executive Order No. 7856 of March 31, 1938, prescribing rules governing the granting and issuing of passports in the United States, I, the undersigned, Secretary of State of the United States, hereby prescribe the following regulations:

No passport heretofore issued shall be valid for use in traveling from the United States to any country in Europe unless it is submitted to the Department of State for validation.

Before the Department of State will validate any passport heretofore issued for use in any country in Europe, it will be necessary for the person to whom the passport was issued to submit documentary evidence concerning the imperativeness of his proposed travel. A person who desires travel in Europe for commercial purposes must support his application for the validation of his passport or for the issue of a passport with a letter from the head of the firm in the interests of which he intends to go to Europe. Such letter must state not only the names of the European countries which the applicant expects to visit and the objects of his visits thereto, but in addition, whether or not the applicant is a salaried employee of the firm concerned; and if so, how long he has been known to the

firm and for what period of time he has been in its employ. If the applicant is going to Europe on a commission and not a salary basis, that fact also should be specifically stated. If the applicant for a passport is himself the head of the concern for which he is going to Europe, he must submit a letter from another officer of the concern or a letter from the head of some other reputable concern who has had business transactions with the applicant and has knowledge of the business in which the applicant is engaged and the object and necessity of his proposed trip to Europe.

An applicant who is going to Europe for any purpose other than commercial business must satisfy the Department of State that it is imperative that he go, and he must submit satisfactory documentary evidence substantiating his statement concerning the imperativeness of his proposed trip.

In view of the exigencies of the present situation and the consequent necessity of exercising the greatest care in the validation of passports or the issue of new passports, the Department of State will be obliged to hold applicants and firms responsible for any false or misleading statements made by them in connection with applications for passports, and any such false or misleading statements would be in violation of Section 220 of Title 22 of the U. S. Code, which reads as follows:

"Whoever shall willfully and knowingly make any false statement in an application for passport with intent to induce or secure the issuance of a passport under the authority of the United States, either for his own use or the use of another, contrary to the laws regulating the issuance of passports or the rules prescribed pursuant to such laws, or whoever shall willfully and knowingly use or attempt to use, or furnish to another for use, any passport the issue of which was secured in any way by reason of any false statement, shall be fined not more than \$2,000 or imprisoned not more than five years or both."

Women and children will not be included in passports issued to their husbands or fathers unless the urgent and imperative necessity of accompanying them is conclusively established.

Passports will not, as a rule, be validated or issued for travel in opposing belligerent countries.

Should a person now having a valid passport proceed to any European country without first having submitted his passport to the Department of State for validation, the protection of the United States may be withheld from him while he is abroad.

Should a person to whom a passport has been issued use it in violation of the conditions or restrictions contained therein, the protection of the United States may likewise be withheld from him while he is abroad and he will be liable for prosecution under the provisions of Section 221 of Title 22 of the U. S. Code, which reads in part as follows:

“* * * whoever shall willfully and knowingly use or attempt to use any passport in violation of the conditions or restrictions therein contained, or of the rules prescribed pursuant to the laws regulating the issuance of passports, which said rules shall be printed on the passport: * * * shall be fined not more than \$2,000 or imprisoned not more than five years, or both.”

Hereafter when a passport is validated for or issued for use in Europe, its validity shall be restricted to the period necessary to accomplish the purpose of the intended visit to Europe but in no case beyond a period of six months.

Passports in possession of persons now residing abroad shall in due course be submitted to American consular officers for appropriate endorsement under special instructions to be sent to such officers at a later date.

CORDELL HULL

Department of State,
September 4, 1939.

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Mr. Clegg	Mr. Glavin
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Mr. Carson	Mr. Egan
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Mr. Mumford	Mr. Quinn
Mr. Nease	Mr. Tamm
Mr. Pennington	Mr. Winterrowd
Mr. Starnes	Tele. Room
Mr. Sullivan	Mr. Holloman
Miss Gandy	

Joint Statement of the Senate and House

January 1940

Joint Statement of the Senate and House

United States of America

ON FEBRUARY 1940, THE SENATE AND HOUSE OF REPRESENTATIVES
PASSED A JOINT RESOLUTION TO APPROVE THE PROPOSED
TREATY.

THIS WAS THE FIRST TIME IN HISTORY

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INDEX

	Page
Opinion below.....	1
Jurisdiction.....	1
Questions presented.....	2
Statute involved.....	2
Statement.....	2
Argument.....	4
Conclusion.....	14

CITATIONS

Cases:

<i>Armour Packing Co. v. United States</i> , 209 U. S. 56.....	13
<i>Armour Packing Co. v. United States</i> , 153 Fed. 1.....	13
<i>Arrow Distilleries v. Alexander</i> , 109 F. (2d) 397.....	13
<i>Astor v. Merritt</i> , 111 U. S. 202.....	5
<i>Bartos v. United States District Court</i> , 19 F. (2d) 722.....	13
<i>Billings v. United States</i> , 232 U. S. 261.....	5
<i>California v. Latimer</i> , 305 U. S. 255.....	12
<i>Caminetti v. United States</i> , 242 U. S. 470.....	5
<i>Chicago, St. Paul, M. & O. Ry. Co. v. United States</i> , 162 Fed. 835, certiorari denied, 212 U. S. 579.....	13
<i>Coykendall v. Skrmetta</i> , 22 F. (2d) 120.....	13
<i>De Ganay v. Lederer</i> , 250 U. S. 376.....	5
<i>De Lima v. Bidwell</i> , 182 U. S. 1.....	8
<i>Federal Power Commission v. Metropolitan Edison Co.</i> , 304 U. S. 375.....	12
<i>Helvering v. Wilshire Oil Co.</i> , 308 U. S. 90.....	8
<i>Morrissey v. Commissioner</i> , 296 U. S. 344.....	8
<i>Puerto Rico v. Shell Co.</i> , 302 U. S. 253.....	8
<i>Queen v. Tolson</i> , 23 Q. B. D. 168.....	11
<i>Santa Fe Pacific R. R. Co. v. Lane</i> , 244 U. S. 492.....	7
<i>Townsend v. United States</i> , 95 F. (2d) 352, certiorari denied, 303 U. S. 664.....	12
<i>United States v. Erie R. Co.</i> , 222 Fed. 444.....	13
<i>United States v. Illinois Central R. R. Co.</i> , 303 U. S. 239.....	10, 12, 13
<i>United States v. Murdock</i> , 299 U. S. 389.....	10, 11, 12, 13
<i>United States v. Wurts</i> , 303 U. S. 414.....	5

Statute:

U. S. C., Title 22, Section 220 (Section 2 of Title IX of the Act of June 15, 1917, c. 30, 40 Stat. 227).....	2, 4, 5, 6, 7, 8, 10, 14
U. S. C., Title 22, Sections 221, 222.....	9

II

Miscellaneous:

	Page
Annual Report of the Attorney General for 1917, pp. 52-53.	6
Clark & Marshall, <i>Crimes</i> (2d ed. 1905), Sec. 5.	14
Departmental Orders:	
No. 171, promulgated by the Secretary of State on June 12, 1920.	7
No. 386 of February 12, 1926.	7
No. 433-A of January 31, 1928.	7
No. 538 of June 22, 1932.	7
No. 749 of March 31, 1938.	7
Executive Orders:	
No. 4382-A of February 12, 1926.	7
No. 4800 of January 31, 1928.	7
No. 5860 of June 22, 1932.	7
No. 7856 of March 31, 1938.	7
H. Rep. No. 30, 65th Cong., 1st Sess.	5
Hunt's <i>The American Passport</i> (ed. 1898) p. 4.	6
War Memoirs of Robert Lansing (1935), p. 73.	6
Maxwell, <i>Interpretation of Statutes</i> (6th ed.), pp. 144-145.	8
Notice to Bearers of Passports, first issued by Department of State May 11, 1929; and reissued March 20, 1930; October 15, 1931; February 20, 1932; January 3, 1933; March 7, 1934; March 27, 1935; March 1, 1936; February 1, 1937; May 1, 1938; January 16, 1939.	5
The Oxford English Dictionary.	5
Rules Governing the Granting and Issuing of Passports in the United States, promulgated by the President on June 13, 1920.	7
Sayre, <i>Mens Rea</i> (1932), 45 Harv. L. R. 974, 1017, 1019.	12
Webster's International Dictionary.	5

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 287

EARL RUSSELL BROWDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 399-403) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 28, 1940 (R, 403-404). The petition for a writ of certiorari was filed July 29, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by

the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934:

QUESTIONS PRESENTED

1. Whether the courts below properly construed U. S. C., Title 22, Section 220, punishing the "use" of a passport secured by a false statement, to include the exhibition of a passport, as proof of citizenship, to an immigrant inspector by a citizen returning to this country.

2. Whether the evidence established that the petitioner "willfully" committed the offenses charged.

STATUTE INVOLVED

The pertinent portion of U. S. C., Title 22, Section 220 (Section 2 of Title IX of the Act of June 15, 1917, c. 30, 40 Stat. 227), is as follows:

* * * whoever shall willfully and knowingly use or attempt to use * * * any passport the issue of which was secured in any way by reason of any false statement, shall be fined not more than \$2,000 or imprisoned not more than five years, or both.¹

STATEMENT

An indictment in two counts was returned in the United States District Court for the Southern District of New York. The first count charged that

¹ Section 220 is set out in full in the Appendix to petitioner's brief (p. 3).

the petitioner, having procured a passport by reason of a false statement to the effect that he had had no previous passport, willfully and knowingly used the passport on April 30, 1937, by presenting it to an immigrant inspector to secure entry into the United States (R. 2-3). The second count charged the petitioner with a similar use of the same passport on February 15, 1938 (R. 4-5). The case went to the jury, and a verdict of guilty on both counts was returned (R. 301). Petitioner was sentenced to imprisonment for four years and fined \$2,000—two years and \$1,000 on each count (R. 378). On appeal the conviction of the petitioner was unanimously affirmed by the Circuit Court of Appeals for the Second Circuit (R. 404).

The facts are uncontroverted. The evidence showed that the petitioner, a citizen of the United States (R. 347), made written application on August 31, 1934, for a United States passport (Exs. 2 and 18, R. 93-94, 306, 348-350). The application blank contained the clause "My last passport was obtained from ——— and is submitted herewith for cancelation." Petitioner wrote the word "None" in the blank space, signed the application and swore that the facts therein contained were true. Actually, petitioner had previously applied for and obtained three passports, under the names of Nicholas Dozenberg in 1921 (Ex. 4, R. 134-135, 144, 216, 311-312), George Morris in 1927 (Ex. 16, R. 154,

216, 343-344), and Albert Henry Richards in 1931 (Ex. 3a, R. 189-190, 216, 309-310).

On September 1, 1934, the Department of State issued a passport to petitioner in his own name in response to the application (R. 101). At the petitioner's request, the passport which by its terms expired on September 1, 1936, was on February 2, 1937, extended for two years from the date of expiration (Exs. 5 and 6, R. 86-87, 317, 331). On April 30, 1937, the petitioner returned to this country from a trip abroad and exhibited the passport to an immigrant inspector at the Port of New York as proof of his citizenship and right to enter the United States (Exs. 9 and 11, R. 115, 334, 335). Returning from another trip on February 15, 1938, petitioner again exhibited the passport to another inspector at the same port and for the same purpose (Exs. 10 and 12, R. 115, 334, 336).

ARGUMENT

I.

Petitioner contends that the exhibition of a passport to an immigrant inspector as proof of his citizenship on his return to this country from a trip abroad is not a "use" of such passport within the meaning of Section 220, *supra*, because Congress intended solely to penalize the "use" of a passport abroad.

Statutory words are presumed to be used in their ordinary and usual sense, with the meaning

commonly attributable to them.² The word "use" means "employ," "employ for a purpose," "put to use," "avail one's self of."³ Petitioner employed his passport upon returning from abroad for the purpose of identifying himself as a citizen, a use which patently falls within the ordinary meaning of the word. Nothing contained in the statute points to an intention solely to penalize a use abroad.

A use in this country has long been recognized by the Department of State, in a pamphlet entitled "Notice to Bearers of Passports,"⁴ which was in effect in 1937 and 1938 when petitioner used his passport as charged. This "Notice" states that a passport will "enable the holder to establish his American citizenship upon his return to the United

² *De Ganay v. Lederer*, 250 U. S. 376, 381; *United States v. Wurts*, 303 U. S. 414, 417; *Caminetti v. United States*, 242 U. S. 470, 485.

The presumption in this case is buttressed by the fact that the House Committee Report stated with respect to that portion of Title IX of the Act of which Section 220 is a part, that "The remaining sections of the title are self-explanatory. * * * The committee feel that all the remaining sections of the amended bill are drawn with sufficient clearness to be self-explanatory * * *." H. Rep. No. 30, 65th Cong., 1st Sess., p. 10.

³ *Billings v. United States*, 232 U. S. 261, 281; *Astor v. Merritt*, 111 U. S. 202, 213; *Webster's International Dictionary*; *The Oxford English Dictionary*.

⁴ First issued May 11, 1929; and reissued March 20, 1930; October 15, 1931; February 20, 1932; January 3, 1933; March 7, 1934; March 27, 1935; March 1, 1936; February 1, 1937; May 1, 1938; January 16, 1939.

States and thus facilitate his entry." Another long established use, in the words of the court below, is "the presentation of a passport to foreign consulates here for the procurement of visa, in anticipation of travel abroad" (R. 401).⁵

Petitioner relies upon several extrinsic aids to the construction of Section 220. None could overcome the force of the plain language of the statute. None, moreover, is persuasive even if the statutory language were doubtful.

1. The "history of the times" by which petitioner seeks to establish the evil at which the Act was aimed not only fails to prove an intention exclusively to penalize a "use" abroad, but actually discloses that some of the offensive uses preceding the 1917 enactment took place in this country.⁶

⁵ Petitioner points (Br. 11) to a statement made in Hunt's *The American Passport* (ed. 1898), p. 4, to the effect that a passport "is intended only for use abroad, and has no sanctioned uses, customary or statutory, within the United States * * *." But this statement was made long before the Department of State recognized a use in this country.

⁶ Petitioner quotes Lansing's *Memoirs* to the effect that "Chief among these acts was the improper use of passports issued by the United States * * * to secure the safe passage of Germans through the enemy's lines of blockade to ports in neutral territory adjacent to Germany, which was their ultimate destination" (Br. 15-16). It is clear that the effectuation of this purpose required the use of a passport in order to procure a visa to these neutral countries from their representatives on American soil. The pages (52-53) of the Annual Report of the Attorney General for 1917 cited by the petitioner (Br. 16) summarize the case of *United States v. Franz von Rintelen et al.*, in which the

2. Petitioner relies upon a regulation of the Department of State in force in 1917 when Section 220 was enacted, to the effect that passports "are intended for identification and protection in foreign countries, and not to facilitate entry into the United States, immigration being under the supervision of the Department of Labor," and in substance contends that this construction was embodied in Section 220. Assuming that the regulation was called to the attention of Congress (cf. *Santa Fe Pacific R. R. Co. v. Lane*, 244 U. S. 492, 496), it is sufficient that the Department of State later omitted that regulation⁷ and supplanted it by the "Notice to Bearers of Passports" (*supra*, p. 5) that a passport may be used to facilitate entry

defendants were "under indictment in New York for conspiracy to defraud the United States in connection with use by Rintelen, a German agent, of false passports *in leaving this country.*" (Italics supplied.) This was a use in this country.

⁷ Revision of the passport regulations made by the "Rules Governing the Granting and Issuing of Passports in the United States," promulgated by the President on June 13, 1920, and Departmental Order No. 171, promulgated by the Secretary of State on June 12, 1920, omits the paragraph quoted above in the text. All subsequent Executive Orders and Passport Regulations make a similar omission. Executive Order No. 4382-A of February 12, 1926; Departmental Order No. 366 of February 12, 1926; Executive Order No. 4800 of January 31, 1928; Departmental Order No. 433-A of January 31, 1928; Executive Order No. 5860 of June 22, 1932; Departmental Order No. 538 of June 22, 1932; Executive Order No. 7856 of March 31, 1938; Departmental Order No. 749 of March 31, 1938.

upon return to this country. It is settled that even the reenactment of a statute after uniform administrative practice does not freeze the administrative construction into the statute so as to curtail the administrative power prospectively to change its interpretation. Cf. *Helvering v. Wilshire Oil Co.*, 308 U. S. 90, 100; *Morrissey v. Commissioner*, 296 U. S. 344, 354. In this light, the withdrawal of the early regulation and its supersession by the long-continued "Notice" reinforce the view that the word "use" now embraces an employment of a passport for purposes of reentry into this country.

Moreover, whether or not the use of passports to prove citizenship on reentry into this country was customary in 1917, it was, as we have heretofore shown, a sanctioned and recognized use under regulations in existence in 1937 and 1938, when the acts charged in the indictment occurred. To apply Section 220 to such a use does not, as the Circuit Court of Appeals pointed out (R. 402), change the meaning of the statute. It merely, as the court declared, brings into operation the rule^a that "a statute is prospective and its application to a given state of facts may change as new things or new uses of old things come into existence."

^a See *DeLima v. Bidwell*, 182 U. S. 1; *Puerto Rico v. Shell Co.*, 302 U. S. 253; Maxwell, *Interpretation of Statutes* (6th ed.), pp. 144-145, cited below.

3. Petitioner likewise argues that the cognate Sections 221 and 222^{*} in effect penalize the "use" of an expired passport (Br. 8-10), and asserts that citizens returning to this country constantly exhibit expired passports to immigrant inspectors but are never prosecuted therefor. From this he deduces an administrative construction of "use" in Sections 221 and 222 which excludes a "use" in this country and then carries that construction over to Section 220. Assuming the existence of the practice, it by no means follows that the practice is predicated upon the absence of a "use." Even if the term "use" has the same meaning in all of these sections, Sections 221 and 222 require proof of "willfulness" as well as "use." Administrative officials may well feel that a single use in good faith of an expired passport, which carries its deficiency on its face, to establish a citizen's identity lacks the "willfulness" that is an element of the crime. And the alleged failure to prosecute may be due to that fact rather than to the fact that these officials do not regard the employment of an expired passport to effect reentry as a "use." In any event, the test of the lawfulness of petitioner's acts cannot be that other possible or technical illegalities are condoned under other statutory provisions..

4. There remains the argument that in 1917 and at the time of petitioner's entries no law *required*

^{*} Sections 221 and 222 are set forth at p. 3 of the Appendix to Petitioner's brief as Sections 3 and 4 of the 1917 Act.

those who entered the United States to produce a passport, and that the word "use" consequently was not intended to embrace such employment (Br. 14, 17-19). It might with equal logic be urged that the term has no application to a use abroad, for the law did not then and does not now *require* the use of a passport abroad. Pressed to its logical conclusion, that argument would deprive Section 220 of all effect. Petitioner has, we believe, entirely misconceived the scope of Section 220. Of course, it was not intended to "curb the entry into the United States of citizens" (Br. 17). But it was intended to curb the *use* of passports procured by reason of a false statement, wherever that use might take place.

II.

Petitioner urges that "The courts below construed 'willfully and knowingly' in conflict with flat authority in this Court", citing *United States v. Murdock*, 290 U. S. 389, and *United States v. Illinois Central R. Co.*, 303 U. S. 239. The argument is that these cases define "willfully" in terms of "evil purpose" whereas the trial court defined it in terms of deliberate design.¹⁰ Here, petitioner contends, no "willful" use was established inas-

¹⁰ Petitioner failed to except to the District Court's charge defining willfulness in terms of deliberate design. It is therefore not entirely clear whether petitioner, on review of the denial of his motion to dismiss, is entitled to urge that the court applied an erroneous definition of "willfulness."

much as no evil intent or purpose was proved. To support this definition of "willful," petitioner relies chiefly on the *Murdock* case. That case, it is true, gives "an act done with a bad purpose" as one of five general meanings of willful. But it goes on to characterize as willful an act done (pp. 394-395)—

[1] without justifiable excuse * * * [2] stubbornly, obstinately, perversely * * * [3] a thing done without ground for believing it is lawful * * *, or [4] conduct marked by careless disregard whether or not one has the right so to act * * *.

In attributing more than one meaning to willfulness, the Court merely took cognizance of the fact that the term is employed in defining widely differing statutory crimes and that, as has long been recognized, "mental elements of different crimes differ widely." *Queen v. Tolson*, 23 Q. B. D. 168, 185 (1889). "Malice," for example, Justice Stephen declared in the *Tolson* case, "means one thing in relation to murder, another in relation to the Malicious Mischief Act, and a third in relation to libel, and so of fraud and negligence" (*id.* at 187). And willfulness, like malice, is a special intent specified as an element of particular crimes (*id.* at 189). It is only "in very few criminal cases that 'willful' means 'done with a bad purpose'."¹¹

¹¹ As the law grew, the "original requirement of an underlying evil motive * * * came to be supplanted by the requirement of specific forms of intent evolved separately

Townsend v. United States, 95 F. (2d) 352, 358 (App. D. C.), certiorari denied, 303 U. S. 664. And see *United States v. Illinois Central R. Co.*, 303 U. S. 239, 242-243.

The term "willfulness" is to be construed in the light of the purpose it is intended to serve. The qualification that an act must be willful is calculated to protect one who acts in good faith. *Federal Power Commission v. Metropolitan Edison Co.*, 304 U. S. 375, 387; *California v. Latimer*, 305 U. S. 255, 261. "Congress", said this Court in the *Murdoch* case (at p. 396), "did not intend that a person, by reason of a bona fide misunderstanding * * * should become a criminal by his mere failure to measure up to the prescribed standard of conduct." It is plain that petitioner did not act in good faith. Repeated applications for passports under an assumed name accompanied by fraudulent documentation (R. 147, 345), repeated falsifications as to the issuance of prior passports (R. 309, 343), and repeated "use" of passports so obtained (R. 184, 187-188),¹² constitute a course of conduct that precludes any *bona fide* use of the passport obtained

for each particular felony." Sayre, *Mens Rea* (1932), 45 Harv. L. R. 974, 1019. Today, for example, arson involves "simply a narrow specific intent to burn a house occupied as a dwelling; the motive may be entirely free from malevolence or desire to injure." *Id.* at 1017.

¹² Petitioner was seen in Moscow in 1921 (R. 184) while the Dozenberg passport was outstanding. This passport was only usable by petitioner because it bore his photograph (R. 134, 186). No passport under petitioner's own name was issued until 1934 (R. 58). Similarly, in 1933, at which

through concealment of these offenses. It is, therefore, "willful" as defined in the *Murdock* case. Certainly these acts show the subsequent use of the passport to be "conduct marked by careless disregard whether or not one has the right so to act", and they show "a thing done without ground for believing it is lawful".

To the extent that petitioner protests that his use of the passport was not with a bad purpose, he falls upon another horn of his dilemma. This Court, in *United States v. Illinois Central R. Co.*, 303 U. S. 239, 242, declared that—

In statutes denouncing offenses involving turpitude, "willfully" is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication.¹³

Petitioner's crime did not involve moral turpitude.¹⁴ He was not convicted of "making a false

time the Richards passport was valid and outstanding, petitioner was again seen in Moscow (R. 187-188). This passport was still in effect when petitioner procured the passport under his own name (R. 198-199).

¹³ See *Armour Packing Co. v. United States*, 209 U. S. 56, 85-86; *Armour Packing Co. v. United States*, 153 Fed. 1, 23 (C. C. A. 8th); *Chicago, St. Paul, M. & O. Ry. Co. v. United States*, 162 Fed. 835, 842 (C. C. A. 8th), certiorari denied, 212 U. S. 579; *United States v. Erie R. Co.*, 222 Fed. 444, 449 (D. N. J.); *Arrow Distilleries v. Alexander*, 109 F. (2d) 397, 405 (C. C. A. 7th).

¹⁴ Cf. *Bartos v. United States District Court*, 19 F. (2d) 722, 724 (C. C. A. 8th); *Coykendall v. Skrmetta*, 22 F. (2d) 120 (C. C. A. 5th).

statement," the act made unlawful by the first portion of Section 220, and one which may likewise be regarded as perjury. Instead, petitioner was convicted of *using* a passport secured by reason of a false statement. There are, to be sure, uses of documents fraudulently procured, such as the negotiation of forged notes and the like, which are so directly injurious as to be odious in themselves, and *mala in se* because they are moreover common-law crimes. Clark & Marshall, *Crimes* (2d ed. 1905), Section 5. But a citizen's use for identification at home or abroad of a passport secured through a false statement does not fall within this category. It was not a common-law crime; it does not injure the one to whom it is exhibited; and it does not directly injure the Government. The use is prohibited in order to maintain the integrity of United States passports, and the offense is therefore *malum prohibitum*. In consequence, under the rule of the *Illinois Central* case, the word "willful" in Section 220 must be construed as having no implication of evil purpose.

CONCLUSION

The case was correctly decided by the court below. There is no conflict of decisions and the petition presents no question of general public

importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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AUGUST 1940.

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Summary of Argument	8
Argument:	
I. The presentation of a fraudulently obtained passport by a citizen of the United States to establish his citizenship at a port of entry upon returning from abroad is a "use" within the meaning of the statute ..	13
II. The evidence was sufficient to establish a "willful" use within the meaning of the statute	33
Conclusion	43
Appendix A	44
Appendix B	46

CITATIONS

Cases:

<i>California v. Latimer</i> , 305 U. S. 255	37
<i>Commonwealth v. Smith</i> , 166 Mass. 370	31, 36
<i>Cottrell v. Penn</i> [1936] 1 K. B. 53	38*
<i>Delaney v. United States</i> , 263 U. S. 586	35
<i>De Lima v. Bidwell</i> , 182 U. S. 1	10, 27
<i>Euclid v. Amber Realty Co.</i> , 272 U. S. 359	32
<i>Federal Power Commission v. Metropolitan Edison Co.</i> , 304 U. S. 375	37
<i>Felton v. United States</i> , 96 U. S. 699	37
<i>Flora v. Rustad</i> , 8 F. (2d) 335	33
<i>Greater New York Live Poultry Chamber of Commerce v. United States</i> , 47 F. (2d) 156	35
<i>Hebe Co. v. Shaw</i> , 248 U. S. 297	32
<i>Helvering v. Wilshire Oil Co.</i> , 308 U. S. 90	10, 27
<i>Horning v. District of Columbia</i> , 254 U. S. 135	36
<i>Keller v. United States</i> , 213 U. S. 138	31
<i>King, The v. Wheat</i> [1921] 2 K. B. 119	38
<i>Manton v. United States</i> , 107 F. (2d) 834, certiorari denied, 309 U. S. 664	35
<i>Morrissey v. Commissioner</i> , 296 U. S. 344	11, 27
<i>People v. Billardello</i> , 319 Ill. 124	31
<i>People v. Clark</i> , 242 N. Y. 313	37
<i>People v. Weiss</i> , 276 N. Y. 384	37

II

Cases—Continued.

	Page
<i>Potter v. United States</i> , 155 U. S. 438.....	37
<i>Puerto Rico v. Shell Co.</i> , 302 U. S. 253.....	10, 27, 28
<i>Parity Extract Company v. Lynch</i> , 226 U. S. 192.....	32
<i>Queen, The v. Prince</i> , L. R. 2 C. C. R. 154.....	36
<i>Queen v. Tolson</i> , 23 Q. B. D. 168.....	38
<i>Semler v. Oregon State Board of Dental Examiners</i> , 294 U. S. 608.....	32
<i>Scurr v. United States</i> , 174 U. S. 728.....	37
<i>Stromberg v. California</i> , 283 U. S. 359.....	18
<i>St. Louis & S. F. R. Co. v. United States</i> , 169 Fed. 69.....	38
<i>Tenement House Department v. McDewitt</i> , 215 N. Y. 160.....	31
<i>Thomas v. The King</i> , 59 C. L. R. 279.....	38
<i>Townsend v. United States</i> , 95 F. (2d) 352, certiorari denied, 303 U. S. 664.....	37
<i>United States v. American Trucking Associations</i> , 310 U. S. 534.....	15
<i>United States v. Balint</i> , 258 U. S. 250.....	31
<i>United States v. Giles</i> , 300 U. S. 41.....	15
<i>United States v. Illinois Central Railroad Co.</i> , 303 U. S. 239.....	38
<i>United States v. Jin Fuy May</i> , 241 U. S. 394.....	15
<i>United States v. Katz</i> , 271 U. S. 354.....	15
<i>United States v. Mosely</i> , 238 U. S. 383.....	10, 27, 28
<i>United States v. Murdock</i> , 284 U. S. 141.....	40
<i>United States v. Murdock</i> , 290 U. S. 389.....	13, 35, 37, 39, 41
<i>United States v. Raynor</i> , 302 U. S. 540.....	15
<i>United States v. Warszower</i> , No. 338, present Term.....	18, 22, 23
<i>United States v. Wurzbach</i> , 280 U. S. 396.....	18
<i>Urtetiqui v. D'Arcy</i> , 9 Pet. 692.....	23
<i>Van Camp & Sons v. American Can Co.</i> , 278 U. S. 245.....	10, 27, 28
<i>Vatjauer v. Comm'r of Immigration</i> , 273 U. S. 103.....	40
Statutes:	
Immigration Act of February 5, 1917, c. 29, 39 Stat. 874.....	10, 23
Title IX of the Espionage Act of June 15, 1917, c. 30, 40 Stat. 227:	
Section 1 (U. S. C., Title 22, Sec. 213).....	44
Section 2 (U. S. C., Title 22, Sec. 220).....	2, 8, 14, 44
Section 3 (U. S. C., Title 22, Sec. 221).....	9, 15, 19, 20, 45
Section 4 (U. S. C., Title 22, Sec. 222).....	9, 15, 20
Act of May 22, 1918, c. 81, 40 Stat. 559 (U. S. C., Title 22, Secs. 223-226).....	11, 28
Act of March 2, 1921, c. 113, 41 Stat. 1217 (U. S. C., Title 22, Sec. 227).....	30
Act of March 28, 1940, c. 72, 54 Stat. 80.....	45
Rev. Stat. Sec. 2001 (U. S. C., Title 8, Sec. 14).....	32
United States Code:	
Title 8, Sec. 220.....	33
Title 18, Secs. 75, 103, 117.....	37
Title 18, Sec. 81.....	37

III

Statutes—Continued.

United States Code—Continued.

	Page
Title 18, Secs. 89, 98.....	37
Title 18, Sec. 96.....	37
Title 18, Sec. 110.....	37
Title 18, Secs. 111, 120, 124, 231.....	37
Title 18, Sec. 116.....	37
Title 18, Sec. 222.....	37
Title 18, Sec. 281.....	37
Title 18, Sec. 328.....	37
Title 22, Secs. 223, 227.....	33
Title 50, Supp. V, Secs. 31-38.....	37

Miscellaneous:

Borchard, <i>Diplomatic Protection of Citizens Abroad</i> , pp. 493-495.....	23, 32
56 Cong. Rec., Pt. 6:	
pp. 6028, 6039, 6064-6067, 6191-6192.....	29
pp. 6063-6067.....	29
pp. 6191, 6192.....	29
Executive Order No. 2932 of August 8, 1918, Sec. 13.....	26
Executive Order No. 366 of February 12, 1926.....	25
Executive Order No. 4800 of January 31, 1928.....	25
Executive Order No. 5860 of June 22, 1932.....	25
Executive Order No. 7856 of March 31, 1938.....	25
H. Rep. No. 30, 65th Cong., 1st Sess., p. 10.....	14
H. Rep. Nos. 65 and 69, 65th Cong., 1st Sess.....	14
H. Rep. No. 485, 65th Cong., 2d Sess., p. 3.....	29
Hunt, Gaillard, <i>The American Passport</i> , p. 4.....	23
Holmes, <i>The Common Law</i> , pp. 58-59.....	31
Kenny, <i>Outlines of Criminal Law</i> (15th ed.), p. 50.....	38
Presidential Passport Rules:	
June 7, 1911, Rule 4.....	24
January 12, 1915, Rule 5.....	25
December 17, 1915, Rule 7.....	25
April 17, 1916, Rule 6.....	25
January 24, 1917, Rule 6.....	24, 25
June 13, 1920.....	25
Presidential Proclamation of August 8, 1918.....	28
State Departmental Order:	
No. 171 of June 12, 1920.....	25
No. 433-A of January 31, 1928.....	25
No. 538 of June 22, 1932.....	25
No. 749 of March 31, 1938.....	25

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 287

EARL RUSSELL BROWDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Circuit Court of Appeals
(R. 399-403) is reported in 113 F. (2d) 97.

JURISDICTION,

The judgment of the Circuit Court of Appeals
was entered June 28, 1940 (R. 403-404). The pe-
tition for a writ of certiorari was filed July 29,
1940, and was granted on October 14, 1940. The
jurisdiction of this Court is conferred by Section
240 (1) of the Judicial Code as amended by the Act
of February 13, 1925. See also Rule 11 of the
Criminal Appeals Rules promulgated by this Court
May 7, 1934.

QUESTIONS PRESENTED

1. Whether the statute making criminal the willful and knowing "use" of "any passport the issue of which was secured in any way by reason of any false statement" (U. S. C., Title 22, Section 220) applies to the use of a passport at a port of entry, as proof of citizenship, by a citizen of the United States returning from abroad.

2. Whether there was sufficient evidence to permit the jury to find that petitioner's use of the passport was "willful" within the meaning of the statute.

STATUTE INVOLVED

Section 2 of Title IX of the Espionage Act of June 15, 1917, c. 30, 40 Stat. 227 (United States Code, Title 22, Sec. 220) provides:

Whoever shall willfully and knowingly make any false statement in an application for passport with intent to induce or secure the issuance of a passport under the authority of the United States, either for his own use or the use of another, contrary to the laws regulating the issuance of passports or the rules prescribed pursuant to such laws, or whoever shall willfully and knowingly use or attempt to use, or furnish to another for use, any passport the issue of which was secured in any way by reason of any false statement, shall be fined not more than \$2,000 or imprisoned not more than five years or both.

The full text of Title IX of the Espionage Act of June 15, 1917 (United States Code, Title 22, Secs. 213, 220, 221, 222), is set forth in Appendix A, *infra*, pp. 44-45.

STATEMENT

Petitioner was indicted on November 17, 1939, in the United States District Court for the Southern District of New York. The indictment was in two counts. The first count charged that the petitioner, having secured a passport by reason of false statement to the effect that he had had no previous passport, wilfully and knowingly used the passport on April 30, 1937, by presenting it to an immigrant inspector to secure entry into the United States (R. 2-3). The second count charged the petitioner with a similar use of the same passport on February 15, 1938 (R. 4-5). Petitioner was convicted on both counts on January 22, 1940 (R. 301). He was sentenced to imprisonment for four years and fined \$2,000; two years' imprisonment and \$1,000 fine on each count (R. 378). On appeal to the Circuit Court of Appeals for the Second Circuit the judgment was unanimously affirmed (R. 404).

On August 31, 1934, petitioner submitted the form printed application for a passport at a Passport Agency of the Department of State (Exh. 2, R. 305-306; Exh. 18, R. 348-350; R. 93-94, 97). The application blank contained the clause: "My

last passport was obtained from _____ and is submitted herewith for cancellation.”¹ Petitioner wrote the word “None” in the blank space, signed the application (Exh. 18, R. 348-350), and took oath that the statements therein contained were true (R. 75). On September 1, 1934, a United States passport was issued to petitioner on this application (R. 101) and was thereafter obtained by him (R. 102-103, 108).

As issued, the passport was valid for two years, but its validity could be extended for an additional two years from the original expiration date (R. 104). On February 2, 1937, the period of its validity was extended until September 1, 1938, by renewal application made by petitioner (Exh. 6, R. 331; Exh. 18, R. 348-350; R. 86-87; Exh. 5, R. 317).

Petitioner arrived at the port of New York on April 30, 1937, on the *S. S. Berengaria*, having sailed from Cherbourg after a trip abroad (R. 115, Exh. 9, R. 334; R. 116-117; Exh. 11, R. 335; R. 119, 123, 214; Exh. 5, R. 326). Again, on February 15, 1938, he arrived on the *S. S. Aquitania*, also having sailed from Cherbourg (R. 115; Exh. 10, R. 334; R. 116-117; Exh. 12, R. 336; R. 125,

¹The form appeared as follows (Exh. 2, R. 305):

“My last passport was obtained from _____

(Insert Washington or location of office abroad)

on _____ and is submitted herewith for cancellation _____
(Date)

(Give disposition of passport, if it cannot be submitted)

129, 214). On both occasions he used his passport to identify himself and to establish to the satisfaction of the immigrant inspector his citizenship and consequent right to enter the United States (R. 119-122, 125, 127; Exh. 5, R. 316).

Although petitioner had answered "None" to the question on his passport application concerning the obtaining of his last passport, actually he had previously obtained by fraud three other United States passports in names not his own (Exh. 4, R. 311-312; R. 134-135, 143-147; Exh. 16, R. 343-344; Exh. 16A, R. 345; R. 170, 150-161; Exh. 3A, R. 309-310; R. 189-190, 196-197, 216).

On March 10, 1921, petitioner, assuming the identity of one Nicholas Dozenberg, applied for a passport at the agency of the Department of State at New York (Exh. 4, R. 311-312; R. 134-135, 143-147, 216). To accomplish this end petitioner induced the perjury of a woman who asserted she was Katherine Dozenberg, his wife, and served as identifying witness (Ex. 4, R. 312). As proof of citizenship, petitioner submitted a naturalization certificate issued to Nicholas Dozenberg (R. 147). Petitioner swore to the truth of the statements in the application, including assertions of birth in Latvia and subsequent naturalization in Boston (Exh. 4, R. 311-312; R. 216). A passport was issued on this application, obtained by petitioner (R. 144-146) and subsequently used (R. 134, 184, 186, 58, 96).

In 1927 petitioner fraudulently obtained a second passport (Exh. 16, R. 343-344, Exh. 16A, R. 345; R. 150-161, 170, 216). On this occasion he assumed the name "George Morris." As proof of citizenship, he submitted an affidavit asserting that he was born in New York City, the son of "Martha Morris" (Exh. 16A, R. 345; R. 164). Petitioner procured the perjury of one Powers, who, acting as identifying witness on the application, swore that he had known "George Morris" for five years and that the facts stated in petitioner's application under that name were true (Exh. 16, R. 343-344; R. 152, 164).

On this application, as on the application which petitioner made in 1934 in his own name, petitioner concealed the fact that he had previously obtained a passport in the name of Dozenberg, and wrote the word "None" in the space provided for the applicant's previous passport history (Exh. 2, R. 305; Exh. 16, R. 343; R. 216).

Petitioner's obtaining of a passport in the name of George Morris precipitated an investigation (R. 173-174). There is no evidence that petitioner ever applied for a renewal of the passport in that name.

In 1933 petitioner fraudulently obtained a third passport, this time under the name Albert Henry Richards (Exh. 3A, R. 309-310; R. 189-190, 196-197, 216). As proof of citizenship on that occasion, petitioner submitted, as his own, the birth certifi-

cate of Albert Henry Richards, born in Oshkosh, Wisconsin (Exh. 3A, R. 309; R. 193). Again, petitioner answered the question with respect to his last passport with the word "None" (Exh. 3A, R. 309; R. 192-193). On November 19, 1931, a passport bearing petitioner's photograph and the name Albert Henry Richards was issued (Exh. 3A, R. 310; R. 96, 190, 196). This passport was used by petitioner (R. 187-188, 58, 96).

On November 9, 1933, petitioner renewed the passport in the name of Albert Henry Richards at the Passport Agency in Chicago, so that its validity was extended for an additional two years from the date of issue (Exh. 3, R. 307-308; R. 197, 216).

As a result, for more than fourteen months, between September 1, 1934, the date of the issuance of the passport in petitioner's own name, and November 18, 1935, the expiration date of the renewed passport obtained by petitioner in the name of Albert Henry Richards, petitioner, contrary to law (R. 197-199) had two United States passports.

At the conclusion of the Government's case petitioner rested. No evidence was introduced to contradict that offered by the Government.

At the opening of the trial (R. 15), and again at the close of the evidence (R. 226-236), petitioner moved to dismiss the indictment and excepted to the denial of the motion. He contended below, as

he does here, that the use of the passport alleged and proved is not a "use" prohibited by the statute; and that there is no evidence that the passport was used "willfully" within the meaning of the statute.

SUMMARY OF ARGUMENT

I

The exhibition of a fraudulently obtained passport to establish the bearer's right to enter the United States as a citizen upon returning from abroad is a "use" within the meaning of Section 2 of Title IX of the Espionage Act of 1917. The plain language of the statute must be taken to mean that Congress intended, at the very least, to punish those uses of fraudulently obtained, forged, altered, and transferred passports which are customarily incident to travel and which fall within the ambit of the ordinary incentives for obtaining passports by deceit and for forging, altering, or transferring them. The State Department has recognized that the presentation of a passport to establish citizenship upon return from abroad is one of the ordinary functions of a passport. There is no basis for the petitioner's contention that the statute applies only to uses which are "fraudulent" in themselves, in the sense that they involve a false representation of fact, since the evident theory of the statute is to strengthen the prohibitions against fraudulently obtaining pass-

ports by punishing uses which are within the ordinary incentives for obtaining them by fraud.

The cognate sections of the statute do not support the petitioner's interpretation. That the immigration authorities tolerate the use of an expired passport to establish citizenship upon returning from Canada, Bermuda, or Mexico, does not establish that the presentation of a passport to obtain entry is not a "use" within the meaning of the provisions (U. S. C., Title 22, Secs. 221, 222) prohibiting the use of passports "in violation of the conditions or restrictions therein contained" or the use of a "passport validly issued which has become void by the occurrence of any condition therein prescribed invalidating the same". It is at least arguable that these provisions apply only to passports used in violation of special emergency conditions imposed by the State Department and not to those invalidated by the ordinary time limitation. On the other hand, a measure of liability which excludes a use of a passport to obtain entry to the United States would create, as one of many absurd consequences, an immunity for an alien employing an American passport acquired by fraud to effect an illegal entry. It is difficult to believe that Congress, legislating after two months of war, intended to reach an American citizen who exhibited a fraudulently obtained passport abroad but did not intend to reach a foreign agent who first exhibited a fraudulent passport upon arrival at an American port.

The use of a passport to pass a port of the United States upon return from abroad is a use "*qua* passport." The petitioner's argument that it is not relies upon definitions of the function of a passport which were formulated before passports were commonly required anywhere and before the Immigration Act of 1917 (39 Stat. 874) imposed a general restriction upon entry to the United States. The argument exhibits the danger of finding the essence of a thing in its historic origin alone. Petitioner's use of the passport was a use to pass a port. It was a use *qua* passport within the meaning of any definition which takes account of the facts of life.

Even if passports were not commonly used to facilitate reentry when the statute was passed, it would not follow that the statute is inapplicable now that such a use is concededly common and recognized. The Circuit Court of Appeals correctly ruled that "the meaning of a statute does not change save as it may be amended; but a statute is prospective and its application to a given state of facts may change as new things or new uses of old things come into existence." See also *De Lima v. Bidwell*, 182 U. S. 1, 197; *Puerto Rico v. Shell Co.*, 302 U. S. 253; *Van Camp & Sons v. American Can Co.*, 278 U. S. 245, 253; *United States v. Mosely*, 238 U. S. 383, 388. Not even an administrative construction followed by the reenactment of the statute would preclude the power to change the administrative interpretation at least prospectively. Cf. *Hel-*

vering v. Wilshire Oil Co., 308 U. S. 90, 100; *Morrissey v. Commissioner*, 296 U. S. 344, 354. Hence the presence since 1929 in the State Department's "Notice to Bearers of Passports" of the statement that a passport "will enable the holder to establish his American citizenship upon his return to the United States and thus facilitate his entry" would, in itself, be fatal to the petitioner's claim.

Similar considerations refute the contention that the statute is inapplicable because the prehistory of the Espionage Act shows that Congress was concerned with the use of fraudulently obtained or false American passports to penetrate belligerent lines rather than with the use of such passports to enter the United States. Moreover, Congress was not indifferent to the use of such passports by American citizens to enter the United States. This is indicated by the Act of May 22, 1918, c. 81, 40 Stat. 559 (U. S. C., Title 22, Secs. 223-226), a statute regarded as supplementary to the Espionage Act, which, for a limited time made it unlawful for citizens to depart from or enter the United States without a valid passport. It is also indicated by documents in the files of the State Department which establish the concern of the administration, prior to the passage of the Espionage Act, with abuses of American passports in entering the United States.

Even if Congress had been primarily concerned about the use of American passports abroad, it must

have recognized the almost certain presumption that a person arriving from abroad who uses a passport to identify himself as an American citizen must also have used the passport abroad; and, further, that it is a virtual impossibility to prove the use abroad, especially in time of war. It is reasonable to suppose, therefore, that Congress would have intended to attach the sanction to a use which is readily susceptible of proof, if only because it is satisfactorily indicative of the uses which cannot be proved.

Finally, the statute is not inapplicable because the petitioner could presumably have established in other ways the conceded fact that he is a citizen. If it were, a citizen who presented a fraudulently obtained passport to invoke diplomatic protection abroad would not violate the statute because he could have established his citizenship and entitled himself to protection in other ways. The statute strikes not at the end for which the passport is used but at its use as a means.

II

Petitioner argues that his use of the passport to obtain immediate entry to the country was not "willful" within the meaning of the statute. We doubt that the question is properly before the Court. In any event, the evidence sufficed to establish a "willful" use. The word "willfully," when employed in a criminal statute, does not have a stereo-

type meaning and, in no event, means that the prohibited act must be done with an ulterior, evil end. In *United States v. Murdock*, 290 U. S. 389, upon which petitioner mainly relies, this Court held that it was relevant to a defense that the prohibited act was done in reliance upon an affirmative belief in its legality. There is no evidence in the present case that the defendant acted with such a belief and the evidence of his previous conduct with respect to the obtaining and using of passports precluded a finding that he was attentive to the question of legality until after the institution of the present prosecution. The issue of mistake of law accordingly did not arise and there was no evidence of mistake of fact. The petitioner rests his claim on the simple ground that he could have accomplished lawfully what he chose to accomplish unlawfully. Nothing in the decisions interpreting the word "willfully" as used in various penal statutes sustains the availability of this defense.

ARGUMENT

I

THE PRESENTATION OF A FRAUDULENTLY OBTAINED PASSPORT BY A CITIZEN OF THE UNITED STATES TO ESTABLISH HIS CITIZENSHIP AT A PORT OF ENTRY UPON RETURNING FROM ABROAD IS A "USE" WITHIN THE MEANING OF THE STATUTE

The Circuit Court of Appeals held that the presentation of the fraudulently obtained passport by a citizen of the United States to establish his citizen-

ship upon returning from abroad is a "use" of the passport within the meaning of Section 2 of Title IX of the Espionage Act of June 15, 1917, c. 30, 40 Stat. 227 (U. S. C., Title 22, Sec. 220). We contend that its decision was correct.

First: Section 2 of the Espionage Act makes it a crime willfully and knowingly to make any false statement in an application for a United States passport, with intent to secure its issuance in violation of law or regulation and willfully and knowingly to "use or attempt to use, or furnish to another for use, any passport the issuance of which was secured in any way by reason of any false statement". In plain language, deliberately employed, Congress has declared that no one shall attempt to obtain a passport by deceit, or, having succeeded, shall profit from the deceit by making use of the passport or by furnishing it to another for use. Cognate sections provide that a passport shall not be used in violation of the conditions or regula-

² The House Committee report stated with respect to that portion of the Act of which Section 220 is a part: "The remaining sections of the title are self-explanatory * * *. The committee feel that all the remaining sections of the amended bill are drawn with sufficient clearness to be self-explanatory * * *." H. Rep. No. 30, 65th Cong., 1st Sess., p. 10 (Petitioner's Brief, Appendix, p. 26).

Both the first and second conference reports state that no material change was made in conference in the provisions of the bill relating to passports (H. Rep. Nos. 65 and 69, 65th Cong., 1st Sess.) and there is nothing in the legislative history which suggests that any of the language of these provisions was employed in any restrictive sense.

tions therein contained; that it shall not be used or furnished for use by someone other than the person for whom it was intended (Sec. 3; U. S. C., Title 22, Sec. 221); that it shall not be forged, counterfeited, mutilated, or altered with intent to use it or to permit its use; and that neither such a false passport nor one which has become void "by the occurrence of any condition therein prescribed invalidating the same" shall be used or furnished for use (Sec. 4; U. S. C., Title 22, Sec. 222). Thus, in every instance where the statute condemns an abuse of the passport which is not itself a use, it goes on to condemn a use of the passport so abused.

In determining the uses which are comprehended within this inclusive prohibition, one must refer to the standard which determines when general statutory language may be held inapplicable to particular situations included within its ordinary meaning. Unless the application of the statute leads to results which are absurd or futile or which are unreasonable and plainly at variance with the policy of the legislation as a whole, the language must be taken to mean what it says. *United States v. American Trucking Associations*, 310 U. S. 534, 543.³ Measured by this test we think the statute applies, as the Circuit Court of Appeals held, to "any of the uses to which passports regularly is-

³ See also *United States v. Jin Fuey Moy*, 241 U. S. 394; *United States v. Katz*, 271 U. S. 354; *United States v. Giles*, 300 U. S. 41; *United States v. Raynor*, 302 U. S. 540.

sued may be customarily put" (R. 402). For in striking at the "use" of passports deceitfully obtained, forged, altered or improperly transferred Congress must have intended, at the very least, to reach those uses in connection with travel which are a part of the ordinary incentives for obtaining passports, or for forging, altering or transferring them.

Second: If the statute applies to customary use, to uses within the ambit of the ordinary incentives for obtaining and possessing passports, there can be no doubt that it applies to a use to establish citizenship and right to enter the country upon returning from abroad. The evidence shows that this is a usual and customary use (R. 121, 126). To the immigrant inspector at the port the certification that the bearer of the passport is a "citizen of the United States" is "the most acceptable evidence of citizenship" (R. 126); he does not regard himself as beyond reach of the request which the passport addresses to "all whom it may concern" to permit the bearer "safely and freely to pass." That this is one of the ordinary functions of a passport has been recognized by the State Department; since December 5, 1929 it has suggested that American citizens leaving the United States for a country where passports are not required nevertheless carry a passport, assigning as one of the reasons that it will "enable the holder to establish his American citizenship upon his return to the United

States and thus facilitate his entry".⁴ To hold the statutory prohibition inapplicable to such a use would plainly involve an artificial distortion of the language producing a result at variance with the evident theory of the law.

The Circuit Court of Appeals did not hold and we do not argue that the statute applies to *all* uses to which a passport may be put. There is, accordingly, no point to the hypothetical case put by petitioner (Brief p. 17) of the use of a fraudulently obtained passport to identify the holder as a citizen entitled to a license. Such a use is not a customary one. It is not a part of the ordinary incentive for obtaining a passport or for forging, altering or transferring it. It is not a use in connection with travel or an act within the exclusive jurisdiction of Congress. Its punishment involves the large issue which is not present here of the relationship between the federal penal law and the law of the states. That such a use might extend the statute to a realm beyond the reasonable contemplation of Congress clearly does not compel the conclusion that Congress, in punishing the use of certain passports for purposes of travel, intended

⁴ This "notice" was first issued May 11, 1929. It was re-issued December 5, 1929, March 20, 1930, September 26, 1930, October 15, 1931, February 20, 1932, January 3, 1933, July 22, 1933, March 7, 1934, September 15, 1934, March 27, 1935, March 1, 1936, July 15, 1936, February 1, 1937, May 1, 1938, January 16, 1939.

to exclude the use of a passport upon a return to this country.⁵

Third: There is no support in the language or evident theory of the statute for the petitioner's contention that it applies only to uses which are "fraudulent" in themselves, by which we understand him to mean uses which work some deception as to a fact which is relevant to the purpose for which the passport is used. (Petitioner's Brief, pp. 6, 9-10). As we have previously said, the prohibitions of "use" are obviously supplementary to the prohibitions of those abuses of the passport which are not themselves uses. They serve to strengthen the latter prohibitions by declaring that no one shall profit from deceitfully obtaining a passport or from forging, altering or transferring it. Their applicability is measured, therefore, not by the fraud implicit in a particular use, but

⁵ Petitioner adverts, in passing (Brief, pp. 12-13, and note 19, p. 13), to the contention in the courts below in *United States v. Warszower*, No. 338, that the word "use" if applied to a use to obtain entry to the United States "is so indefinite as to suggest its unconstitutionality." It is enough in reply to quote the language of Mr. Justice Holmes, speaking for this Court in *United States v. Wurzbach*, 280 U. S. 396, 399: "Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk."

It is not denied that Congress could constitutionally punish the use of a fraudulently obtained passport to enter the United States. *Stromberg v. California*, 283 U. S. 359, is therefore, not in point.

by whether the use is within the ambit of the ordinary incentives for perpetrating the prior fraud.*

Fourth: Petitioner apparently concedes that the use of a passport in this country to obtain a visa for travel abroad, its use at foreign ports to facilitate entry and exit as an American citizen, and its use in foreign countries to assert the rights accorded to American citizens or to claim diplomatic protection are all "uses" within the meaning of the statute. But he insists that the statute draws a line at the foreign port of embarkation and does not apply when the passport is used to enter an American port upon debarking from a vessel from abroad. We see no reason for thus excluding the final use, as an incident of travel, to which passports are commonly put.

To sustain the distinction, petitioner invokes cognate provisions of the statute punishing a use

*Petitioner places great reliance (Brief, pp. 8-9) upon the following statement of Attorney General Gregory, in recommending the legislation: "There should be punishment for the person who fraudulently obtains or fraudulently uses a passport" (Annual Report, 1916, p. 11; Appendix, Petitioner's Brief, p. 12). We read this sentence as referring not to the uses which are punished when there has been a prior abuse, but to the uses punished by Section 3 of the statute, which are inherently fraudulent in themselves. Compare the prior statement of the Attorney General which epitomizes the three prohibitory sections, in characterizing the Act as one "making criminal the fraudulent obtaining, transfer or use of passports, and the alteration or forgery of passports issued." (Report, p. 17, Appendix, Petitioner's Brief, p. 11.)

"in violation of the conditions or restrictions therein contained" forbidden by Section 3 (U. S. C., Title 22, Sec. 221) and a use of a "passport validly issued which has become void by the occurrence of any condition therein prescribed invalidating the same" prohibited by Section 4 (U. S. C., Title 22, Sec. 222). He argues that "use" cannot include use to obtain entry into the United States as a citizen because if it does the statute would make criminal the practice, which has been countenanced by the immigration authorities, of presenting an expired passport to establish citizenship upon returning to the United States from Canada, Bermuda or Mexico. The Circuit Court of Appeals properly answered: "we see no need of passing on the legality of such a practice" (R. 403). It is, however, worthy of note that petitioner's argument is based on the assumption, sustained by no authority, that expired passports legitimately obtained and held fall within the scope of the provisions quoted above. Whether these provisions apply to a passport invalidated by the ordinary time limitation is at least debatable. They may apply only to passports used in violation of special limitations imposed by the State Department in times of emergency, such, for example, as the limitation of a passport to one trip or to specified geographical areas or the qualifications now endorsed on all passports excluding validity "for travel to or in any foreign state in connection with entrance into or service in foreign military or naval forces." Thus, there is no rea-

son to suppose that the immigration authorities tolerate the practice because they hold that the presentation of passports to obtain entry into the United States is not a "use" within the meaning of the law. It is at least equally possible that their acquiescence may be attributed to the view that the passport is not used "in violation of the restrictions therein contained," nor void because of "any condition therein prescribed invalidating the same." Moreover, in playing upon the meaning of "use" to vindicate the legality of presenting expired passports as evidence of citizenship, petitioner contends, in effect, that the presentation of an expired passport as a method of identification in entering Canada or Mexico would be a violation of the law, though its presentation upon returning to this country would not be. This new incongruity is avoided if the issue is faced not in terms of the meaning of "use" but in terms of the meaning of the clauses describing the passports which may not be used. When the issue is stated in this way, the obvious distinction between the use of a passport which bears its deficiency on its face and the use of a passport obtained, transferred, or altered by fraud may be accorded proper weight.

Fifth: Far from avoiding absurd consequences, apparent upon the face of the statute, a measure of liability which excludes a use of the passport to obtain entry to the United States creates them. If a use at an American port of entry is not a "use" within the meaning of the statute, the prohibition is

inapplicable not alone to the use of fraudulently obtained passports to establish the right to enter but also to the use of passports which have been forged, counterfeited, or altered or which were issued for the use of someone else. It is inapplicable to a citizen charged with crime who enters with a false passport to avoid apprehension and prosecution. It is also inapplicable to an alien employing an American passport acquired by fraud to effect an illegal entry to the United States. Such indeed is precisely the situation in *Warszower v. United States*, No. 338, in which the same argument is advanced. It surpasses belief that Congress, legislating after two months of war, intended to reach an American citizen who exhibited a fraudulently obtained passport abroad but did not intend to reach a foreign agent who first exhibited a fraudulent passport upon arriving at an American port, unless the Government could prove that he was a party to the initial fraud. It is difficult to believe that Congress, legislating to protect the integrity of the American passport, chose to strike at uses abroad which it might be impossible to prove and not at uses upon arriving from abroad which would be susceptible of easy proof. Yet these are the apparent implications of a reading of the statute which distinguishes between a use of a passport at the beginning or during the progress of a journey abroad and a use at the end.

Sixth: Petitioner intimates (Brief, p. 15) and in *Wurszower v. United States*, No. 338, the petitioner strongly argues that the use of a passport at an American port to establish American citizenship is not a prohibited use because it is not a use *qua* passport. In support of the contention reliance is placed upon a dictum of this Court uttered long ago in an irrelevant context that a passport "is a document, which, from its nature and object, is addressed to foreign powers" (*Urtetiqui v. D'Arcy*, 9 Pet. 692, 699) and upon statements of Gaillard Hunt in 1898 and Professor Borchard in 1915 that a passport is designed for use abroad (*The American Passport*, p. 4; *Diplomatic Protection of Citizens Abroad*, p. 493). The argument treats the statute as if it were a treatise on international law. But more than this, it exhibits the danger of finding the essence of a thing in its historic origin alone. Passports were not commonly required anywhere until shortly before the World War (Borchard, *op. cit.* sec. 218) and not until the Immigration Act of February 5, 1917, c. 29, 39 Stat. 874, did Congress impose a general restriction upon entry to the United States. Even if prior to these significant events it would have been analytically correct to exclude from the functions of a passport its use to establish citizenship upon returning from a trip abroad, it seems clear that by these events the ends to be served by the possession of a passport were

drastically changed. On the one hand, the obtaining of passports in connection with travel became a routine affair and on the other hand it became a matter of vital importance for American Immigration inspectors to distinguish between aliens and citizens arriving from abroad. The best evidence of American citizenship that anyone could submit was then as now an American passport. Thus the concept of a passport both at the time when the statute was passed and at the time of the petitioner's acts had become empty if it did not include the function of establishing citizenship upon returning from abroad. There is obviously no reason why the statute should be read to perpetuate a doctrinaire concept, already outmoded when the statute was passed. Petitioner's use of the passport was a use to pass a port. It was a use *qua* passport within the meaning of any definition that takes account of the facts of life.

Seventh: Petitioner invokes a statement in the Presidential Passport Rules in force when the statute was enacted to the effect that passports "are intended for identification and protection in foreign countries, and not to facilitate entry into the United States, immigration being under the supervision of the Department of Labor." (Rules of January 24, 1917, rule 6, par. 2.) The quoted language must be viewed in the context in which it first appears in paragraph 3 of Rule 4 of the Rules of June 7, 1911. This rule called attention to the requirement of the Department of Commerce

and Labor that persons of Chinese race residing in the United States and claiming American citizenship obtain a return certificate before leaving for abroad pursuant to Rule 16 of the Chinese Regulations. In explanation of the inefficacy of the passport as a substitute for the return certificates, the rule added the statement that passports issued by the State Department are intended for identification and protection in foreign countries while in migration [the enforcement of the Chinese Exclusion Act] is under the supervision of the Department of Commerce and Labor. This is the context in which the statement appears in Rule 5 of the Presidential Passport Rules of January 12, 1915 and Rule 7 of the Rules of December 17, 1915. In Rule 6 of the Rules of April 17, 1916, the portion of the statement referring to Chinese claimants of citizenship inexplicably disappeared; the statement about the purpose of passports remained alone and so it stood in Rule 6 of the Rules of January 24, 1917. The next revision came in the Rules promulgated by the President on June 13, 1920, and Departmental Order No. 171, promulgated by the Secretary of State on June 12, 1920. In this revision and in all subsequent Passport Regulations and Executive Orders⁷ the statement is omitted. Between Jan-

⁷ See Executive Order No. 366 of February 12, 1926; Executive Order No. 4800 of January 31, 1928; Departmental Order No. 433-A of January 31, 1928; Executive Order No. 5860 of June 22, 1932; Departmental Order No. 538 of June 22, 1932; Executive Order No. 7856 of March 31, 1938; Departmental Order No. 749 of March 31, 1938.

uary 24, 1917 and June 13, 1920, the Immigration Act of 1917 had been enacted as well as the Espionage Act of June 15, 1917, and the Act of May 22, 1918 (U. S. C., Title 22, Secs. 223-226), which, for a limited time, *required* American citizens to produce passports upon returning from abroad. The Passport Rules of January 24, 1917, were, to be sure, continued in effect by Section 13 of Executive Order No. 2932 of August 8, 1918, but the same executive order put into effect the requirement of the Act of May 22, 1918 that all persons entering the United States from abroad possess passports.

It is difficult to find in these circumstances anything which strengthens petitioner's case. Even if the general statement in the Rules of 1916 and 1917 is to be read without regard to its original reference to the case of Chinese citizens it does not establish that the use of passports upon re-entry was uncommon then and certainly does not establish that such use was uncommon when the statute was passed—after the Immigration Act of 1917. Moreover, even if the use of passports by citizens to establish the right to enter was uncommon when the statute was passed,⁸ as the Circuit Court of Appeals assumed *arguendo* (R. 402), it would not follow that the statute would be inapplicable to such a use after it had become customary. For, as the court below aptly said: "the meaning of a

⁸ That it was not is indicated by the material from the State Department files referred to, *infra*, p. 29, n. 9, and set forth in Appendix B, *infra*, pp. 46-56.

statute does not change save as it may be amended; but a statute is prospective and its application to a given state of facts may change as new things or new uses of old things come into existence" (R. 402). Cf. *De Lima v. Bidwell*, 182 U. S. 1, 197; *Puerto Rico v. Shell Co.*, 302 U. S. 253; *Van Camp & Sons v. American Can Co.*, 278 U. S. 245, 253; *United States v. Mosely*, 238 U. S. 383, 388. Petitioner speaks as if the statement in the Rules, which antedates Section 220, were an administrative construction of the word "use" made in the course of the application of the statute. This it clearly was not. But if it were, it would be of no avail. Not even the re-enactment of a statute after uniform administrative practice freezes the administrative construction into the statute beyond reach of administrative power to change the interpretation at least prospectively. Cf. *Helvering v. Wilshire Oil Co.*, 308 U. S. 90, 100; *Morrissey v. Commissioner*, 296 U. S. 344, 354. Hence the presence since 1929 in the State Department's "Notice to Bearers of Passports" of the statement that a passport will "enable the holder to establish his American citizenship upon his return to the United States and thus facilitate his entry" (see p. 16, *supra*) would, in itself, be fatal to the petitioner's claim.

Eighth: Petitioner contends that the pre-history of the Espionage Act shows that Congress was concerned with the use of fraudulently obtained or false American passports to penetrate belligerent lines rather than with the use of such passports to enter the United States and argues from this

that the statute applies only to uses in leaving the United States or in travel or, perhaps, only to "un-neutral" uses. (Petitioner's Brief, p. 11.) The conclusion would not follow even if the premise were sound. It is not enough to establish the inapplicability of general language to a particular situation to show that the language was not specifically directed at that situation. It must be shown that had the particular situation been envisaged "Congress would so have varied its comprehensive language as to exclude it from the operation of the act." *Puerto Rico v. Shell Co.*, 302 U. S. 253, 257; cf. *Van Camp & Sons v. American Can Co.*, 278 U. S. 245, 253; *United States v. Mosely*, 238 U. S. 383, 388. The point was strikingly made by Mr. Justice Holmes in the *Mosely* case by observing in support of a broad interpretation of general language of the Civil Rights Act that the Fourteenth Amendment "was adopted with a view to the protection of the colored race but has been found to be equally important in its application to the rights of all".

That Congress was not or, at least, would not have been indifferent to the use of fraudulent and false passports by American citizens to establish the right to enter the United States is amply indicated by the Act of May 22, 1918, c. 81, 40 Stat. 559 (U. S. C., Title 22, secs. 223-226). This statute, applicable by its terms while the United States was at war, made it unlawful after the Presidential proclamation of August 8, 1918, for a citizen to depart from or enter the United States without a

valid passport and imposed comparable limitations on the ingress and egress of aliens. The Chairman of the Senate Committee on the Judiciary explicitly stated, in explaining the Committee report, that the bill "may be regarded as a supplement to the Espionage Act" (56 Cong. Rec., Pt. 6, pp. 6191, 6912). The legislative history of the Act makes clear that the *requirement* of a passport was imposed upon entering citizens because of grave concern, voiced by the State Department and the Department of Justice, that renegade American citizens were returning to the United States in the interests of the Central Powers. (See H. Rep. No. 485, 65th Cong., 2d Sess., pp. 2-3; 56 Cong. Rec., Pt. 6, pp. 6028, 6039, 6064-6067, 6191-6192). An amendment to eliminate the provision with respect to the entry of citizens was proposed in the House and defeated on this ground (56 Cong. Rec., Pt. 6, pp. 6063-6067). While the purpose of requiring passports was apparently to establish administrative control over exit and entry and thus to avoid in the case of a citizen seeking entry "the difficulty of securing legal evidence from the place of his activities in Europe" (H. Rep. No. 485, 65th Cong., 2d Sess., p. 3), it is inconceivable that Congress would have regarded a citizen who obtained a passport by fraud as immune from prosecution for a "use" in effecting an entry.⁹ The requirement of a passport in

⁹ In view of the petitioner's extensive reliance upon newspaper reports in the effort to show that the use of passports

the case of citizens was permitted to expire after the war, though the provisions with respect to aliens were continued. (Act of March 2, 1921, c. 113, 41 Stat. 1217, U. S. C., Title 22, sec. 227). But the fact that the requirement was imposed by a statute regarded as supplementary to that under which petitioner was convicted refutes the contention that the use of passports upon entering the United States must be regarded as beyond the contemplation of the Congress.

Ninth: There is another reason why it is unrea-

to obtain entry to the United States was not a matter of concern before the enactment of the Espionage Act, it is of importance to note that the State Department files indicate that the matter was of grave concern at least as early as February 1917. On February 13, Ambassador Gerard cabled: "I recommend that all persons bearing American emergency passports issued Berlin Embassy subsequent to break of diplomatic relations be most carefully investigated before being allowed to land in the United States" (Appendix B, *infra*, p. 46). On February 17, the State Department cabled the American Legation in Copenhagen urging caution in examining the passports of Americans arriving from Germany (Appendix B, *infra*, p. 46) and on April 18 cables were sent to the Legations at Copenhagen, Berne, and The Hague which contained the statement: "It is reported from a reliable source that German authorities will probably attempt to send to the United States secret agents in the guise of American citizens who were unable to leave Germany when diplomatic relations were severed. The same course may be followed by Austria" (Appendix B, *infra*, p. 47). At the same time, efforts were made to enlist the cooperation of the Treasury and the Departments of Justice and Labor to provide for a careful examination of all passengers upon arrival at American ports. The most significant items in this interdepartmental correspondence are set forth in Appendix B, *infra*, pp. 46-56.

sonable to suppose that in enacting the present statute Congress intended to exclude the use of a passport to obtain entry to the United States as an American citizen. Assuming *arguendo* that, as petitioner contends, Congress was primarily concerned with the use of false or fraudulently obtained American passports abroad, it must have recognized the almost certain presumption that a person arriving from abroad who uses a passport to identify himself as an American citizen has also used the passport abroad.¹⁰ It must also have recognized the virtual impossibility of obtaining proof of use abroad, particularly in time of war when effective enforcement of the statute would be most important. In other situations where an act or condition difficult of proof is indicated by another act or condition which is readily proved, legislatures have attached the sanction to the latter as a means of reaching the former.¹¹ There is no basis for believing that Congress rejected this theory of legislation in defining the crime of "use" to supplement the crimes of fraudulent obtaining,

¹⁰ Compare the stamps on Browder's passport (R. 319-320).

¹¹ See Holmes, *The Common Law*, pp. 58-59, and the dissenting opinion of Mr. Justice Holmes in *Keller v. United States*, 213 U. S. 138, 149-150; *Commonwealth v. Smith*, 166 Mass. 370; *Tenement House Department v. McDevitt*, 215 N. Y. 160; *People v. Billardello*, 319 Ill. 124; *United States v. Balint*, 258 U. S. 250. The principle is impliedly recognized by the decisions of this Court holding that a state may constitutionally include within the reach of a statute situa-

forging, altering, and transferring.¹² Viewed in this way the statute embodies its own principle of limitation: it is inapplicable to those uses of passports, unrelated to travel abroad, which are not clearly indicative of uses in foreign countries.

Tenth: There remains the argument that petitioner's use of his passport was not a prohibited use because he could have established in other ways the conceded fact that he is a citizen. By the same token a citizen who presented a fraudulently obtained passport to invoke diplomatic protection abroad would not violate the statute because he could have established his citizenship in other ways and entitled himself to protection (*cf.* Rev. Stat. § 2001, U. S. C., Title 8, Sec. 14; Borchard, *Diplomatic Protection of Citizens Abroad*, pp. 493-495). But the petitioner apparently concedes that such a use is forbidden. It seems clear that the statute strikes not at the end for which the passport is employed but at the use of the false or fraudulent passport as a means. Nothing in the language, tions which do not present the evil at which the statute was aimed, if reasonably necessary to reach the situations which do present the evil. See *e. g.*, *Purity Extract Company v. Lynch*, 226 U. S. 192, 201, 204; *Hebe Co. v. Shaw*, 248 U. S. 297; *Euclid v. Amber Realty Co.*, 272 U. S. 365, 388-389; *Semler v. Oregon State Board of Dental Examiners*, 294 U. S. 608, 612.

¹² Compare the statement of the trial court (R. 28): "there would be a very practical difficulty about prosecution, if they had to go and find the evidence in the bowels of Russia."

theory, or history of the legislation suggests that it must be an essential rather than a customary means.

Congress has been content to rely for the most part on deportation as the sanction against aliens who enter illegally (*Flora v. Rustad*, 8 F. (2d) 335, 337 (C. C. A. 8th)) but it has not hesitated to make illegal entry criminal when it is effected by papers which are false or fraudulently obtained (U. S. C., Title 8, Sections 180a, 220, Title 22, Sections 223, 227). The principle applicable here is the same.

II

THE EVIDENCE WAS SUFFICIENT TO ESTABLISH A "WILLFUL" USE WITHIN THE MEANING OF THE STATUTE

Petitioner contends that even if there was a "use" of the fraudulently obtained passport there was not a "willful" use within the meaning of the law. He argues that "willful" means with evil purpose and that Browder's use could not have been willful in that sense because he was a citizen entitled in any event to enter the country. His contention on this score consists in part of the points we have already answered.¹³ We address ourselves here only to the argument which rests on the alleged meaning of the word "willfully" when used in a criminal statute.

¹³ In the petition for certiorari as in the brief in the Circuit Court of Appeals, the issues of "use" and "willfulness" are carefully separated. It is only in the Brief on the Merits in this Court that they are merged by the petitioner.

First: It is questionable that the contention, whatever its merit, may be urged by the petitioner at this stage. The trial court charged that “‘willfully and knowingly,’ as employed in the statute, mean deliberately and with knowledge and not something which is merely careless or negligent or inadvertent” (R. 292-293). Petitioner did not except to the charge. He did not ask that the instruction be made more explicit or request an instruction defining “willfully” to mean with ulterior, evil purpose.¹⁴ He appears to have been content in the trial court, in arguing that the statute is inapplicable to a use by a citizen to obtain re-entry, to focus on the proposition that it is not a “use” within the meaning of the law.¹⁵ The Circuit Court of Appeals accordingly held (R. 403) that the correctness of the judge’s charge was not open to question on appeal. The ruling was within the discretion of the court and, in view of the extensiveness of the petitioner’s requests and exceptions on other points and his apparent acquiescence on this

¹⁴ In his petition for certiorari, though not in his brief on the merits, petitioner pointed to the 26th, 33d, 35th, and 36th requests to charge (R. 284, 286-287, Petition, p. 25, n.). None of them made the point. One was concerned with his state of mind at the time he made the application for his passport; another embodied his contention that the statute applies only to uses abroad or uses for which a passport is essential. The remaining two concerned the power of an immigration inspector to deny entry to citizens of the United States.

¹⁵ See note 13, *supra*.

one, the discretion of the appellate court was not abused. Cf *Manton v. United States*, 107 F. (2d) 834 (C. C. A. 2d), certiorari denied, 309 U. S. 664; *Greater New York Live Poultry Chamber of Commerce v. United States*, 47 F. (2d) 156 (C. C. A. 2d). Petitioner argues that the question may nevertheless be raised because the motion for a dismissal of the indictment and for a directed verdict put in issue the sufficiency of the evidence to establish the crime charged. The Circuit Court of Appeals held, without articulating a definition of "willfully," that on this issue as on the others the case was properly submitted to the jury. Since two courts have thus sustained the sufficiency of the evidence, we doubt that this Court will examine its sufficiency again. Cf *Delaney v. United States*, 263 U. S. 586, 589-590. In *United States v. Murdock*, 290 U. S. 389, upon which petitioner relies to sustain the availability of the contention, the conviction was reversed, not sustained, by the Circuit Court of Appeals and the precise issue was presented by a request to charge (290 U. S. at 393). Moreover, the decision of this Court in the *Murdock* case was that the issue of willfulness should have been submitted to the jury. In the present case it was.

Second: Assuming, however, that the issue is presented we think that the contention is without merit. The argument that the statute is inapplicable to a citizen of the United States who uses a fraudulently obtained passport to establish his

right to reenter upon returning from abroad is as unfounded when addressed to the statutory word "willfully" as when addressed to the statutory word "use." Browder's use was nonetheless "willful" because he could presumably have established his citizenship eventually in other ways.

If, as we contend, the statutory word "use" includes the use of a passport by a citizen to establish his right to enter the country upon returning from abroad, the evidence clearly proved that petitioner intentionally did what the statute forbids, with knowledge of all the facts upon which the criminality of the act depends. He knew that he had falsely concealed the existence of his earlier passports in order to obtain this one. He used it intentionally to obtain one of the major advantages enjoyed by the bearer of a passport, reentry without delay or inconvenience. There is no doubt that this is sufficient for the ordinary purposes of criminal liability (*cf. Horning v. District of Columbia*, 254 U. S. 135, 137) and that even less would often be enough (*cf. The Queen v. Prince*, L. R. 2 C. C. R. 154; *Commonwealth v. Smith*, 166 Mass. 370). But petitioner contends that when a criminal statute requires that the prohibited act be done "willfully," it must be taken to require that the act be done for the purpose of achieving some evil, ulterior to that inherent in the prohibited act itself. There is nothing in the decisions of this Court which sustains the view that the word "willfully" ever produces so wide a departure from the

general principles of criminal liability; or that its use in criminal statutes has any stereotype meaning at all.¹⁶

The decisions upon which the petitioner relies hold no more than that the presence of the word "willfully" in a statutory definition of crime suggests a legislative purpose to allow the general defenses of mistakes of fact,¹⁷ accident, or unavoidable necessity,¹⁸ or the exceptional defense of mistake of law.¹⁹ Even on these issues, it is clear that

¹⁶ An examination of the statutes themselves makes clear that Congress has followed no consistent pattern in using such words as "knowingly," "willfully," and "maliciously" in defining crimes. See *e. g.*, "knowingly": U. S. C., Title 18, Sections 75, 103, 117; "willfully": U. S. C., Title 18, Sections 111, 120, 124, 231; "knowingly and falsely": U. S. C., Title 8, Section 281; "knowingly and unlawfully": U. S. C., Title 18, Section 110; "knowingly and willfully": U. S. C., Title 18, Sections 89, 98; "knowingly, willfully or wantonly": U. S. C., Title 18, Section 96; "willfully or maliciously": U. S. C., Title 18, Section 116; "unlawfully and willfully": U. S. C., Title 18, Section 328; "knowingly or willfully": U. S. C., Title 18, Section 81; "willfully or knowingly": U. S. C., Title 22, Section 222.

On the other hand, when Congress has intended to make some specific intent an element of a crime, it has not hesitated to say so, as the other sections of the Espionage Act make clear. See U. S. C., Title 50, Supp. V, Sections 31-38.*

¹⁷ *Spurr v. United States*, 174 U. S. 728.

¹⁸ *Felton v. United States*, 96 U. S. 699.

¹⁹ *United States v. Murdock*, 290 U. S. 398; *California v. Latimer*, 305 U. S. 255, 261; *Federal Power Commission v. Metropolitan Edison Co.*, 304 U. S. 375, 387; *Potter v. United States*, 155 U. S. 438. See also *People v. Weiss*, 276 N. Y. 384; *People v. Clark*, 242 N. Y. 313. But *cf. Townsend v. United States*, 95 F. (2d) 352, 358 (App. D. C.), certiorari denied, 303 U. S. 664.

what is determinative is not the formula in which the prohibition is couched, but the necessity of the defense to protect action in good faith and its compatibility with the theory and purpose of the statute.²⁰

But even if the decisions held that the word "willfully" imports an inexorable command that the defense of mistake of law be allowed, they would not aid the petitioner. To hold that a statutory prohibition which is otherwise applicable is inapplicable when the act is done with an affirmative belief in its legality is quite a different thing from holding that the statutory prohibition requires that the acts which are prohibited be done with an ulterior evil purpose. There is no evidence that when petitioner presented his fraudulently obtained passport upon arriving at the Port of New York he did so in the belief that in spite of his antecedent fraud he was legally entitled to employ the passport for this purpose. There is nothing to indicate that he was

²⁰ Thus in *United States v. Illinois Central Railroad Co.*, 303 U. S. 239, not even inadvertence was held to be a defense to a suit for a penalty, although the statute used the words "Knowingly and willfully." See also *St. Louis & S. F. R. Co. v. United States*, 169 Fed. 69 (C. C. A. 8th). Compare *Queen v. Tolson*, 23 Q. B. D. 168, where mistake of fact was held a defense to bigamy although the statutory prohibition was in terms absolute. See also *The King v. Wheat* (1921), 2 K. B. 119; *Cotterill v. Penn* (1936), 1 K. B. 53; *Thomas v. The King*, 59 C. L. R. 279, especially the opinion of Dixon, J., and the dissenting opinion of Evatt, J.; Kenny, *Outlines of Criminal Law* (15th ed.), p. 50.

attentive to the question of legality until after the prosecution had been instituted in this case. If the petitioner had sought to testify that he acted with an affirmative belief in the legality of his act, there would have been occasion to determine the availability of the defense; and if his testimony had been allowed, the jury would have had the opportunity to estimate the sincerity of his claim in the light of his previous actions in obtaining and using passports. But the evidence introduced by the Government did not require a finding that the defendant acted with the belief that in spite of his antecedent fraud, the act was lawful; it precluded such a finding.

The wide difference between the contention in this case and that sustained in the decisions invoked by the petitioner is well indicated by *United States v. Murdock*, 290 U. S. 389, upon which he mainly relies. In the *Murdock* case, this Court held that it was relevant to a defense to a prosecution for the crime of willfully failing to supply information required by law or regulations that the taxpayer refused to supply the information in erroneous reliance upon his constitutional privilege against self-incrimination. It was not until the ruling of this Court on the sufficiency of *Murdock's* special plea in bar that it was settled that the Fifth Amendment afforded him no protection because the crimes which his information would disclose

were crimes against state law.²¹ The trial court withdrew from the jury Murdock's claim that his refusal to answer was made in good faith in reliance upon an actual belief that he was within his constitutional rights. This Court held the ruling to be error and affirmed a judgment of the Circuit Court of Appeals setting aside the conviction. The decision stands for the proposition that a mistake of law, and in particular a mistake of overriding constitutional law, must be submitted to the jury in a prosecution under the section of the Revenue Act involved. It thus reconciled the values inherent in the enforcement of the Revenue Act and the values involved in preserving ample opportunity for the assertion of constitutional rights. It has no application here; where petitioner made no showing that he acted in similar reliance on his supposed legal rights and rests his claim simply on the ground that he could have accomplished lawfully what he chose to accomplish unlawfully.

It is true that in the *Murdock* case this Court referred to "an act done with a bad purpose" as one of six meanings which the word "willfully" may have. But the decisions cited in support of the statement are those to which we have previously referred invoking the defense of mistake of fact

²¹ *United States v. Murdock*, 284 U. S. 141. Indeed, the question had been specifically reserved by the Court in *Vatjauer v. Comm'r of Immigration*, 273 U. S. 103, 113.

or mistake of law. We think the context makes clear that "bad purpose" did not mean, as petitioner argues, and ~~an~~ ulterior evil end. Moreover, the opinion recognized that the word "often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental" (290 U. S. at 394) and added to "done with a bad purpose" four additional meanings: (1) "without justifiable excuse"; (2) "stubbornly, obstinately, perversely"; (3) "a thing done without ground for believing it is lawful"; (4) "conduct marked by careless disregard whether or not one has the right so to act" (290 U. S. at 394-395). The meanings which would have denied the relevancy of the defense were excluded only after an examination of the statute as a whole led to the conclusion that Congress did not intend to provide that taxpayers who failed to disclose information in reliance upon their supposed constitutional rights should act at their peril. It was found to be persuasive that, otherwise, by the terms of the statute a person who "by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records be maintained" would become criminal "by his mere failure to measure up to the prescribed standard of conduct" (290 U. S. at 396). Thus the decision in the *Murdock* case did not declare a general rule as to the meaning of "willfully" and certainly not the rule for which the petitioner contends.

It seems too clear for argument that the freedom of American citizens to use fraudulently obtained passports to achieve entry to the United States does not present a claim for legal protection comparable to that presented when action, which does not involve antecedent fraud, is taken in affirmative reliance upon a supposed legal right.

Third: In connection with his discussion of the sufficiency of the evidence of willfulness, petitioner complains of the summation of the United States Attorney. Insofar as the summation is criticized because it emphasized the fact that petitioner admittedly had obtained previous passports by perjury, the complaint has been answered by what has already been said. The fact was relevant not only to establish that the passport has been secured by fraud but also to dissipate the possibility that at the time of the uses charged in the indictment petitioner acted with an affirmative belief in the legality of his acts. The summation was not attacked upon the appeal to the Circuit Court of Appeals or in the petition for certiorari in this Court. No error has been assigned with respect to it and it seems clear that none could properly be assigned.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

FRANCIS BIDDLE,
Solicitor General.

WENDELL BERGE,
Assistant Attorney General.

JOHN T. CAHILL,
*United States Attorney,
Southern District of New York.*

HERBERT WECKSLER,
RAOUL BERGER,
Special Assistants to the Attorney General.

JANUARY 1941.

ROBERT L. WERNER,
Assistant U.S. Attorney,
Southern District of New York.

APPENDIX A

Title IX of the Espionage Act of 1917, c. 30, 40 Stat. 227 (U. S. C., Title 22, Sections 213, 220, 221, 222), provides:

SECTION 1. Before a passport is issued to any person by or under authority of the United States such person shall subscribe to and submit a written application duly verified by his oath before a person authorized and empowered to administer oaths, which said application shall contain a true recital of each and every matter of fact which may be required by law or by any rules authorized by law to be stated as a prerequisite to the issuance of any such passport. Clerks of United States courts, agents of the Department of State, or other Federal officials authorized, or who may be authorized, to take passport applications and administer oaths thereon, shall collect, for all services in connection therewith, a fee of \$1, and no more, in lieu of all fees prescribed by any statute of the United States, whether the application is executed singly, in duplicate, or in triplicate.

SEC. 2. Whoever shall wilfully and knowingly make any false statement in an application for passport with intent to induce, or secure the issuance of a passport under the authority of the United States, either for his own use or the use of another, contrary to the laws regulating the issuance of passports or the rules prescribed pursuant to such laws, or whoever shall wilfully and knowingly use or attempt to use, or furnish to another for use, any passport the issue of

which was secured in any way by reason of any false statement, shall be fined not more than \$2,000 or imprisoned not more than 5 years¹ or both.

SEC. 3. Whoever shall willfully and knowingly use, or attempt to use, any passport issued or designed for the use of another than himself, or whoever shall willfully and knowingly use or attempt to use any passport in violation of the conditions or restrictions therein contained, or of the rules prescribed pursuant to the laws regulating the issuance of passports, which said rules shall be printed on the passport; or whoever shall willfully and knowingly furnish, dispose of, or deliver a passport to any person, for use by another than the person for whose use it was originally issued and designed, shall be fined not more than \$2,000 or imprisoned not more than five years, or both.

SEC. 4. Whoever shall falsely make, forge, counterfeit, mutilate, or alter, or cause or procure to be falsely made, forged, counterfeited, mutilated, or altered any passport or instrument purporting to be a passport, with intent to use the same, or with intent that the same may be used by another; or whoever shall willfully or knowingly use, or attempt to use, or furnish to another for use any such false, forged, counterfeited, mutilated, or altered passport or instrument purporting to be a passport, or any passport validly issued which has become void by the occurrence of any condition therein prescribed invalidating the same, shall be fined not more than \$2,000 or imprisoned not more than five years, or both.

¹ By the Act of March 28, 1940, c. 72, 54 Stat. 80, the maximum term of imprisonment under this and the succeeding sections was increased to ten years.

APPENDIX B

[Telegram Received]

RC GREEN

FROM Berne

Dated February 13, 1917.

Rec'd 5 P. M.

SECRETARY OF STATE,
Washington.

520, February 13, ten a. m.

From Ambassador Gerard:

"I recommend that all persons bearing American emergency passports issued Berlin Embassy subsequent to break of diplomatic relations be most carefully investigated before being allowed to land in the United States."

STOVALL.

(Telegram sent)

DEPARTMENT OF STATE,
Washington, Feb. 17, 1917.

(Mutatis mutandis to the Legations at Berne and The Hague.)

AMLEGATION,
Copenhagen.

Telegraph Department, if possible, names of all Americans who have arrived in Denmark from Germany since severance diplomatic relations. Also telegraph each day names of all Americans arriving from Germany. Publish notice in press

instructing all Americans who have arrived and who arrive hereafter from Germany to bring their passports to Legation to be visaed. Inform local authorities. Examine passports, comparing them with genuine passports, and question bearers carefully. Telegraph Department concerning any cases in which passports appear to have been improperly issued. Strike out Germany from all passports. If any persons bear emergency passports issued or purporting to have been issued by American Embassy, Berlin, telegraph Department numbers and dates of passports as well as names of holders.

CB/RWF/ELF.

Enciphered by MOR.

Sent by operator 7 P. M., 2/7/17, 191 WU.

[Telegram sent.]

DEPARTMENT OF STATE,
Washington, April 16, 1917.

AMLEGATION,

*The Hague.*¹

See Department's 419, February seventeen, concerning passports of persons arriving from Germany. Follow same procedure with regard to passports of persons arriving from Austria. Endeavor to see that you are informed as to arrival of all such persons.

¹ Similar cables were sent on the same date to the Legations at Berne and Copenhagen.

Confidential. It is reported from a reliable source that German authorities will probably attempt to send to the United States Secret Agents in the guise of American citizens who were unable to leave Germany when diplomatic relations were severed. The same course may be followed by Austria. In doubtful cases require references in the United States and telegraph Department before visaing passports.

(Sgd.) LANSING.

CB-RWF-NLF.

Enciphered by -----

Sent by operator — M., 18/11, 191—.

[Telegram Sent]

DEPARTMENT OF STATE,

Washington, April 11, 1917.

AMLEGATION,

Christiana.

Your 154, April 4.

All persons sailing for this country should be advised to have their passports visaed by a diplomatic or consular officer of the United States. If officer to whom application for visa is made has reason to believe applicant is about to come to this country for an improper or inimical purpose, he should decline visa and report case to Department. If doubtful as to true purposes of applicant, but has no definite grounds for his suspicions, he may visa passport, but should telegraph Department concerning his suspicions, so that person concerned

may be watched. Publish notice in press advising persons to have passports visaed and notify steamship companies. Officers visaing passports should examine each applicant with the greatest care in order to determine whether he is entitled to the passport which he bears and is coming to this country for the purpose alleged by him. No passports held by German subjects should be visaed without the express authorization of the Department.

CB/R F/ELF.

Enciph. by MJR. (Sgd) LANSING.

Sent by operator 8 P. M. 4/11/17, 191 PO.

FEBRUARY 15, 1917.

The Honorable The SECRETARY OF THE TREASURY.

SIR: This Department has received a dispatch of February 13 from Ambassador Gerard, transmitted through the Legation at Berne, in which he recommends that all persons bearing American emergency passports issued by the Embassy at Berlin subsequent to the severance of diplomatic relations between this country and Germany be most carefully investigated before they are allowed to land in this country.

You are requested to instruct the customs officials who examine passports of American citizens returning to this country that they carry out the suggestion of the Ambassador. The Department is telegraphing to Mr. Gerard to state more definitely, if possible, the reasons for his suggestion, and particularly to give the names of any bearers of passports of the kind mentioned who may be suspected of having obtained their passports

fraudulently or of coming to this country for improper purposes.

I have the honor to be, Sir,
Your obedient servant,

ROBERT LANSING.

138./409.

CB/RWF/ELF.

102574

TREASURY DEPARTMENT,
Washington, February 19, 1917.

The Honorable The SECRETARY OF STATE.

SIR: I have the honor to acknowledge the receipt of your letter of the 15th instant relative to a despatch from Ambassador Gerard in which he recommends that all persons bearing American emergency passports issued by the Embassy at Berlin subsequent to the severance of diplomatic relations between this country and Germany be most carefully investigated before they are allowed to land in this country.

You request that the customs officers who examine passports of American citizens returning to this country be instructed to carry out this suggestion of the Ambassador.

You add that your Department is telegraphing to Mr. Gerard to state more definitely, if possible, the reasons for his suggestion, and particularly to give the names of any bearers of passports of the kind mentioned who may be suspected of having obtained their passports fraudulently or of coming to this country for improper purposes.

This Department finds it difficult to instruct customs officers intelligently in the matter in the

absence of the necessary specific information, but has today addressed a circular letter to the collectors of customs at the ports on the Atlantic and Gulf Coasts directing them to scrutinize closely all passports issued by Ambassador Gerard which appear to be of an emergency character, and to make a note of the particulars thereof; also in case of any evidence of irregularity to examine the persons presenting the passport and report by wire to the Department all the circumstances.

This Department does not know, however, as you were advised in your letter dated January 11, 1916, of any provision of law authorizing customs officers, as such, to make arrests or detention of persons without warrants duly issued by competent authority, except in cases involving a violation of the customs revenue.

By direction of the Secretary.

Respectfully,

(Sgd.) S. J. PETUR,
Assistant Secretary.

No Enclosure.

APRIL 25, 1917.

The Honorable The ATTORNEY GENERAL.

SIR: The Department has received telegrams of April 17 and April 20 from the American Legation at Christiania and a telegram of April 18 from the American Minister at Stockholm concerning the steamship BERGENSFJORD of the Norwegian-American Line, which sailed from Bergen April 16 with a large number of passengers for the United States. It appears that a number of the passengers have not had their passports visaed by diplomatic or consular officers of the United States, and the Minister

at Christiania suspects there may be persons on board the vessel who are agents of the German Government. For this reason it appears that the Minister, through Captain James Totten, Military Attaché to the Legations at Christiania, Stockholm and Copenhagen, requested Colonel White of the Rockefeller Foundation to examine passports of all passengers for the United States en route and to report suspicious cases to this Government upon his arrival in the United States. At the suggestion of the Minister, the Department is telegraphing to the American Consul-General at Halifax, Nova Scotia, to obtain permission for Colonel White to proceed directly by rail from Halifax to Washington, in order that he may submit his report to the Government before the BERGENSFJORD reaches the port of New York.

It is obviously of considerable importance to have a thorough examination made of all persons coming to this country on the BERGENSFJORD, and also those coming in the future upon vessels sailing from Scandinavian ports. In this connection it may be observed that the Minister at Stockholm reported in his telegram of April 18 that the steamer UNITED STATES of the Scandinavian-American Line was expected to sail from Copenhagen on April 19.

Under the present arrangement with the Treasury Department, passports of American citizens entering this country are taken up by custom officers. It is deemed important to examine each and every alien entering the United States carefully, in order to ascertain not only his nationality, but also his object in coming to the United States

and the places in this country where he expects to reside. So far as immigrants are concerned, such an examination is understood to be made by officials of the immigration service. However, it seems probable that numerous aliens will come to this country who do not belong to the immigrant class. It also occurs to this Department that agents of the German Government may attempt to enter the United States in the guise of immigrants. Furthermore, it is possible that such persons may attempt to enter this country as American citizens, bearing forged American passports or American passports fraudulently procured. It is respectfully suggested that you make an arrangement under which special agents of the Department of Justice may cooperate with officials of the customs service in connection with the examination of passengers on the BERGENSFJORD and other vessels arriving in the United States from foreign ports, particularly Scandinavian ports. It is also suggested that arrangements be made under which special agents of the Department of Justice may cooperate with officials of the customs service in examining persons leaving ports of the United States, especially those sailing for Scandinavian ports. In this connection it may be observed that officers of the Scandinavian lines do not require persons sailing on their vessels to carry passports.

I have the honor to be, Sir,

Your obedient servant,

For the Secretary of State:

(Sgd.) FRANK L. POLK,

Counselor.

138./472.

CB/RWF/OFS.

REH:AEK

Address reply to Department of Justice, "The Attorney General," and
refer to initials and number

WASHINGTON, D. C.,
April 27, 1917.

The Honorable, The SECRETARY OF STATE,
Department of State.

SIR: I have the honor to acknowledge the receipt of your letter of the 25th instant, regarding the desire of your Department that alien passengers on the steamship "Bergensfjord" which sailed from Bergen April 16, 1917, to the United States, and those on other vessels coming in from Scandinavian ports, be subject to careful examination in order to ascertain not only their nationality but their object in coming to the United States and the place in this Country, where each expects to reside.

The New York office of the Bureau of Investigation of this Department has been instructed thoroughly in the premises and it will cooperate in this respect with the Customs and Immigration officials in order to avoid duplication of work.

Respectfully.

For the Attorney General:

(Sgd.) CHARLES WARREN,
Assistant Attorney General.

DEPARTMENT OF LABOR,
OFFICE OF THE ASSISTANT SECRETARY,
Washington, May 1, 1917.

54261/152

The Honorable, The SECRETARY OF STATE.

SIR: This Department has received today, under cover of a communication from the Secretary of

Commerce, a copy of your letter of April 25th (138./472-CB/RWF/OFS), in which you request that special agents of the Department of Justice cooperate with officials of the Customs Service in connection with the examination of passengers expected soon to arrive on the S. S. "Bergensfjord" of the Norwegian-American Line, and point out that you understand an examination is made of immigrants by officials of the Immigration Service, but that it is probable that numerous aliens will arrive who do not belong to the immigrant class—this apparently being the reason for requesting that officials of the Department of Justice assist the Customs officers in conducting the examination.

A copy of your letter is being forwarded to the Commissioner of Immigration at New York with instructions to take such measures as he deems proper to insure that all alien passengers arriving by the SS "Bergensfjord" are subjected to an especially careful examination under the terms of the immigration law. It is hoped that these instructions may reach the Commissioner in time to effect the purpose which you have in view. Of course, so far as American citizens are concerned, the authority of the immigration officials is limited to holding them for such length of time as may be necessary in order to ascertain beyond peradventure of doubt that they are not aliens; but this authority can usually be exercised in such a way as to protect every interest of the Government.

In connection with this case, permit me to call attention to the fact that the immigration law of the United States was changed as long ago as 1903 to apply to all aliens, without regard to any classi-

fication of them as immigrants; and since that date the immigration officials have not only had authority to examine aliens without regard to the class in which they travel or whether they are coming for permanent or temporary purposes or are merely passing through the country in transit to other countries, but it has been the duty of such officers to conduct examinations in all such cases.

If the Department of State will promptly bring to the attention of this Department all instances in any degree resembling that described in that Department's letter of April 25th to the Attorney General, instructions will immediately be given that will insure that all passengers are subjected to a proper examination under the immigration law and that every passenger claiming American citizenship with regard to whose claim there is any doubt is held until such doubt has been clearly and completely removed from the case. Of course, to the full extent that it is necessary or advisable to permit either Customs officers or officers of the Department of Justice to cooperate or to participate in the handling of any cases, the immigration officials will permit such cooperation or participation in such manner as to prevent duality or confusion of authority and at the same time effect the objects in view.

Respectfully,

(Sgd.) LOUIS F. POST,
Assistant Secretary.

AWT/EJS.

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SUPREME COURT OF THE UNITED STATES.

No. 287.—OCTOBER TERM, 1940.

Earl Russell Browder, Petitioner,
 vs.
 The United States of America.

On Writ of Certiorari to the
 United States Circuit Court
 of Appeals for the Second
 Circuit.

[February 17, 1941.]

Mr. Justice REED delivered the opinion of the Court.

The question is whether the use by an American citizen of a passport obtained by false statements to facilitate reentry into the United States is a "use" within section 2 of the Passport Title of the Act of June 15, 1917,¹ and, if so, whether petitioner was properly convicted of a "willful" use. We brought the case here because of its importance in the administration of the passport laws.

Section 2 provides that whoever shall either make a false statement in an application for a passport or "shall willfully and knowingly use . . . any passport the issue of which was secured in any way by reason of any false statement, shall be fined not more than \$2,000 or imprisoned not more than five years or both." The indictment in two counts charged that petitioner, having secured a passport by a false statement, willfully and knowingly used it on April 30, 1937, and again on February 15, 1988, each time by presenting it to an immigration inspector to gain entry into the United States. The proof showed that petitioner, a native-born American citizen, had in 1921, 1927, and 1931 obtained passports.

¹ 40 Stat. 217, 227, Title IX:

"Sec. 2. Whoever shall willfully and knowingly make any false statement in an application for passport with intent to induce or secure the issuance of a passport under the authority of the United States, either for his own use or the use of another, contrary to the laws regulating the issuance of passports or the rules prescribed pursuant to such laws, or whoever shall willfully and knowingly use or attempt to use, or furnish to another for use, any passport the issue of which was secured in any way by reason of any false statement, shall be fined not more than \$2,000 or imprisoned not more than five years or both."

By the Act of March 28, 1940, the maximum term of imprisonment under this section was increased to ten years. 54 Stat. 80.

under different assumed names by means of false statements. In 1934 petitioner applied for a passport in his own name. The application blank contained the clause: "My last passport was obtained from _____ and is submitted herewith for cancellation." Despite the three passports previously issued to him, petitioner wrote "none" in the blank space, then signed the application and swore to the truth of its contents. The Government issued him a passport which was later extended upon a renewal application until September 1, 1938. Returning from Europe in April, 1937, and again in February, 1938, petitioner showed his passport to an inspector to identify himself and establish his citizenship and consequent right to reenter the United States. The jury convicted him on both counts for willfully using a passport secured by a false statement, and the District Court sentenced him to two years' imprisonment and a fine of \$1,000 on each count, the terms to run consecutively. The Circuit Court of Appeals affirmed.² At the time of the indictment, the statute of limitations had run on the obtaining of the passport by a false statement (18 U. S. C. § 582).

Petitioner contends that the indictment is for the "use" "of a passport as truthful proof of his Kansas birth." Since the "use" to prove an admitted fact—his American citizenship—was innocent, it is urged, no statutory prohibition was violated. The indictment, however, charges that petitioner "used . . . a passport . . . the issue of which he secured by reason of a false statement . . . in the application therefor." The language of the indictment conforms to the definition of the offense in the statute, as the use of "any passport the issue of which was secured in any way by reason of any false statement." The balanced form of section 2, quoted above at note 1, shows that the Congress viewed with concern and punished with equal severity the securing of passports by false statements and their use. The crimes denounced are not the securing or the use but either of such actions made criminal only by the false statements in the procurement of the passport. If the misrepresentation is withdrawn nothing culpable remains in the use. A condemned use of a passport secured by the fraud seems obviously within the act.

A more difficult issue emerges from petitioner's assertion that the use proven here is not the kind of use covered by the statute. He

² 113 F. (2d) 97.

finds the prohibitions directed against "dishonest uses of the safe-conduct of the United States in foreign relations." Such use must be "willful and knowing," an expression said to bear the connotation of evil or dishonest. Attention is called to alleged passport frauds of about the time of the passage of the passport sections and to the recommendation of the Attorney General that Congress pass legislation against the fraudulent use of passports.³ These are brought forward as indicative of the purpose of Congress to punish fraudulent uses or those uses abroad which would involve misuse of the privilege, under international law, of traveling through foreign countries.

It is quite true that passports are used chiefly in foreign travel. There is no limitation, however, to that field and surely the close connection between foreign travel and reentry to this country is obvious. The plain meaning of the words of the act covers this use. No single argument has more weight in statutory interpretation than this.⁴ Nothing in the legislative history is brought to our attention which indicates any other purpose in Congress than that expressed by the words of the act. The final form of the enactment did not vary in this particular portion from the bill originally introduced.⁵ The Government does not urge that every use of a fraudulent passport is violative of the act but only those "uses in connection with travel which are a part of the ordinary incentives for obtaining passports." Certainly the use to prove citizenship on reentry to the country is within the ordinary incentives.⁶ It is entirely clear from the record that passports were customarily used to prove the bearer's citizenship on reentry into the United States at the time of this alleged offense. The use of a passport for reentry is now routine, although neither at the time of the passage of the

³ Report of the Attorney General (1916), p. 17.

⁴ *United States v. American Trucking Association*, 310 U. S. 534, 543.

⁵ H. R. 291, 65th Cong.

⁶ Since 1929, the State Department has carried substantially the following suggestion in its "Notice to Bearers of Passports": "22. An American citizen leaving the United States for a country where passports are not required is nevertheless advised to carry a passport, except in travel to Canada or Mexico. The passport may later save the time and inconvenience of applying for one abroad should the holder desire to travel in countries where passports are required. It will also enable the holder to establish his American citizenship upon his return to the United States and thus facilitate his entry. American citizens who leave the United States without passports should carry with them proof of their citizenship, such as birth, baptism, or naturalization certificates."

Browder vs. United States.

act nor at present are passports required of citizens on reentry. Our conclusion is not weakened by the fact that the Act of May 22, 1918,⁷ which required citizens to use passports to depart from or enter the United States, was permitted to expire after the war emergency. While passports no longer were required for reentry, their use for that purpose afterwards became both convenient and customary.

The fact that at the time of the passage of the act, passports were not customarily used by citizens to assure easy reentry is brought forward by petitioner to support the argument that Congress did not intend to punish uses such as the one charged here. There is nothing in the legislative history to indicate that Congress considered the question of use by returning citizens. Old crimes, however, may be committed under new conditions. Old laws apply to changed situations.⁸ The reach of the act is not sustained or opposed by the fact that it is sought to bring new situations under its terms.⁹ While a statute speaks from its enactment, even a criminal statute embraces everything which subsequently falls within its scope.¹⁰ The use here charged under these tests was clearly within the scope of the act. The purpose of this act was to punish the use of passports obtained by false statements.

There is the further contention that the Government's construction of the word "use" would make criminal, under other sections of the act, the presentation of expired passports for the purpose of identifying citizens returning from Mexico, Bermuda and Canada. Petitioner urges that such uses, though frequent and apparently acquiesced in by the authorities, would then violate section 3, which prohibits a use "in violation of the conditions or restrictions therein contained," and also section 4, which prohibits the use of a passport "validly issued which has become void by the occurrence of any condition therein prescribed invalidating the same." The question of the meaning of other sections is not before us. Considered solely from the standpoint of their analogy to section 2, the

⁷ 40 Stat. 559.

⁸ Cf. *Cain v. Bowlby*, 114 F. (2d) 519, 522, and cases and instances there cited; Maxwell, *Interpretation of Statutes*, (7th ed. 1929) pp. 69-70.

⁹ *Newman v. Arthur*, 109 U. S. 132, 138; *Pickhardt v. Merritt*, 132 U. S. 252, 257; *DeLima v. Bidwell*, 182 U. S. 1, 197.

¹⁰ *State v. Butler*, 42 N. M. 271, 274; *Commonwealth v. Tilley*, 23 N. E. (2d) 245 (Mass.); *People v. Hines*, 284 N. Y. 93, 104.

use of expired passports to identify the holder seems entirely different from the use of a passport obtained by false statements. The vice in the latter is congenital. Its willful use is prohibited.

Petitioner points out, however, that the use must be "willfully and knowingly." In his view this means a use which is dishonest in addition to or apart from the dishonesty in obtaining the passport, and which is in itself evil "as the use of a passport to invoke fraudulently the protection of the United States abroad." Further it is said this evil must be the kind of evil within the spirit and intent of the act. But the statute plainly does not purport to punish fraudulent or dishonest use other than such as is involved in the use of a passport dishonestly obtained. None of its words suggest that fraudulent use is an element of the crime. The statute is aimed at the protection of the integrity of United States passports. It penalizes both procuring the passport by a false statement and its use when so procured. The crime of "use" is complete when the passport so obtained is used willfully and knowingly.

Read in its context the phrase "willfully and knowingly," as the trial court charged the jury, can be taken only as meaning "deliberately and with knowledge and not something which is merely careless or negligent or inadvertent." No exception was taken to this instruction. The point at issue arises because a motion was denied to dismiss the indictment on the ground that "the government's case is fatally defective in that it lacks the main essential ingredient of the entire case; namely, the criminal intent of the defendant at the time of the alleged act"; that there is "no proof that there was a knowing and willful use to gain entry." Petitioner relies upon *United States v. Murdock*.¹¹ That case affirmed a reversal of conviction for a violation of section 1114(a) of the Revenue Act of 1926 and a like section of the 1928 act. These sections made it a misdemeanor for a taxpayer to "willfully" fail to supply information in regard to income. The taxpayer refused the information on the ground of privilege from fear of self-incrimination. At the time the law upon the point was uncertain. This reasonable fear, this Court held, entitled the taxpayer to requested instruction on his good faith in refusing to answer. This claim of constitutional right is quite different from the claim here of a right to use a passport obtained by false representation, contrary to the express words of the statute,

¹¹ 290 U. S. 389, 394.

because there was no ulterior evil purpose in mind. The *Murdock* opinion recognizes; p. 394, that the word "willful" often denotes an intentional as distinguished from an accidental act. Once the basic wrong under this passport statute is completed, that is the securing of a passport by a false statement, any intentional use of that passport in travel is punishable.

Other suggestions as a basis for reversal are made. These do not require particular comment.

Affirmed.

Mr. Justice MURPHY took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.